

**A NEW UNIFORM VOTING SYSTEM FOR
ELECTIONS TO THE EUROPEAN
PARLIAMENT?**

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Submitted in accordance with the requirements for the degree
of PhD.

Cardiff University
Cardiff Law School

January 2013

ACKNOWLEDGEMENTS

The origins of this project go back quite a while, to my time as an exchange student at Aberystwyth University. In his lectures and tutorials, equally informative as well as compelling and entertaining, Professor Chris Harding raised my scientific interest in the European Parliament.

During the LL.M. course at the University of Aberdeen, my tutor Carole Lyons' class on the Draft Treaty establishing a Constitution for Europe introduced me to the matter of democratic legitimacy and drew my attention to European Parliament elections.

For their involvement in this project in their function as supervisors, I extend my gratitude for demanding as well as encouraging support to David Broughton, Professor Dan Wincott and Jo Hunt. Furthermore, this research would not have become reality without the granting of a Cardiff Law School scholarship.

Generous support of various offices in the European Parliament, in particular of Andrew Duff, MEP, and his advisor Sietse Wijnsma, significantly advanced progress of this project. Entering Parliament through the Altiero Spinelli entrance always lifted the spirits.

To my grandparents, Kurt und Gertrud Kark, who taught me about the importance of elections and the need to stand up for democracy, no matter the circumstances; And to my parents, who supported me in all respects.

To Conny, for always being there for me.

ABSTRACT

This thesis looks at the critical issue of electoral system reform relating to elections to the European Parliament. Directly elected since 1979, elections to the European Parliament operate on the basis of highly diverging national systems in the 27 member states, despite a mandate for electoral reform which should lead to a uniform system since the 1950s.

The analysis of this thesis centres around the matters of legitimacy and the perceived democratic deficit, as surprisingly, there has been little or no discussion to date on the way the electoral system of elections to the European Parliament promotes or hinders the democratic legitimacy of the European Union. The European Union is conceptualised by the means of three different models, the EU as an international organisation, a supranational technocratic regime, and as a federal order. This thesis addresses the democratic deficit point by constructing an ideal type electoral system where it is currently lacking - in relation to a federal order.

This research makes an interdisciplinary contribution by combining a value free positive political science on the one side and a normative legal approach on the other. Whereas a good deal of legal analysis is either explicitly based on a federal model of the European Union or implicitly premised on such an approach, detailed analysis of the implications of federalism for EU level democracy is much less common.

Next to historic developments in the field of electoral reform in the European Parliament, the recent Duff Reports as well as the debates around them are analysed. The thesis concludes that an electoral system needs to generate competition between European parties on European matters and presents core elements of a draft European Elections Act, a new uniform voting system for elections to the European Parliament.

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ABBREVIATIONS

AFCO	Constitutional Affairs Committee
ALDE	Alliance of Liberals and Democrats for Europe
AM	Assembly Member
AV	Alternative Vote
BC	Borda Count
BV	Block Vote
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
EC	European Communities
ECJ	European Court of Justice
ECR	European Conservatives and Reformists Group
ECSC	European Coal and Steel Community
EEC	European Economic Community
EES	European Election Studies
EFD	Europe of Freedom and Democracy Group
EP	European Parliament
EPP	European People's Party (Christian Democrats)
EU	European Union
FPTV	First Past The Post
GDR	German Democratic Republic
Greens EFA	Greens - European Free Alliance
GUE/NGL	European United Left/Nordic Green Left
IDEA	International Institute for Democracy and Electoral Assistance

IGC	Intergovernmental Conference
List PR	List Proportional Representation
LV	Limited Vote
MEP	Member of the European Parliament
MMP	Mixed Member Proportional
MP	Member of Parliament
PBV	Party Block Vote
PES	Party of European Socialists
PR	Proportional Representation
PIREDEU	Providing an Infrastructure for Research on Electoral Democracy in the European Union
S&D	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
SMP	Single-Member Plurality
SNTV	Single Non-Transferable Vote
SONE	Second-Order National Elections Model
STV	Single Transferable Vote
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRS	Two-Round System
TTD	Two-Tier Districting
UEF	Union of European Federalists

INTRODUCTION

‘The health of democracies, of whatever type and range, depends on a wretched technical detail – electoral procedure. All the rest is secondary. If the regime of the elections is successful, if it is in accordance with reality, all goes well; if not, though the rest progresses beautifully, all goes wrong.’¹

This thesis looks at the critical issue of electoral system reform relating to elections to the European Parliament. Directly elected since 1979, the European Parliament is a dramatic and unique example of a transnational, directly elected parliament, with a significant legislative, supervisory and budgetary role in the European Union. As we shall see, elections to the European Parliament operate on the basis of highly diverging national systems in the 27 member states. This is despite a mandate for electoral reform which should lead to a uniform system, having been in place since the 1950s.

The analysis of this thesis centres around the matters of legitimacy and the perceived democratic deficit, as surprisingly, there has been little or no discussion to date on the way the electoral system of elections to the European Parliament promotes or hinders the development of democracy and the democratic legitimacy of the European Union. It is into this gap that my thesis makes an intervention and a contribution. This thesis attempts to address the democratic deficit point by

¹ J. Ortega y Gasset, *The Revolt of the Masses* (New York: W. W. Norton 1930, 1932, 1964, 1993), p 158.

constructing an ideal type electoral system where it is currently lacking - in relation to a federal order.

In this thesis, the European Union is conceptualised by the means of three different models. These three models are, in turn, the EU as an international organisation, a supranational technocratic regime, and as a federal order. As we shall see, the matter of legitimacy is a crucial one, albeit different models are themselves based on different legitimating mechanisms. When analysing the European Union through the lens of the different models, however, democracy is only important really for the federal model. The other models looked at are sceptical or even hostile to conventional notions of input democracy at the European Union level.

By constructing the ideal type electoral system, this thesis offers more of a normative proposal than a hypothetical deductive analysis. The ideal model differs significantly from past and present reform attempts. When, for example, the Rapporteur on electoral reform of the current legislature, Andrew Duff, proposes electoral reform, he is trying to move the European Union in the direction of a more democratic and more federal European Union. Although he is a distinguished analyst of European integration, he remains primarily a political actor. One thing he has not done, and so far no one has attempted, is to analyse what kind of electoral system would best promote or best facilitate democratic legitimacy in the European Union conceived of as a federal system, as if they were full force principles. That is ultimately the biggest contribution of this thesis, which is an interdisciplinary thesis drawing on law and political science.

To determine which electoral system the EU should adopt for elections to the EP, this thesis first investigates the European Parliament's role in providing legitimacy to the European Union in Chapter One. The first Chapter commences with an investigation into the nature of the European Parliament, with insights drawn from the catalogue of functions performed by parliaments found at national level. This chapter then moves on to the core concepts of legitimacy and democracy, which are explored in relation to three main models of the European Union, derived from academic literature in the fields of both political science and law. First, these three models and their corresponding integration theories are introduced. This thesis argues that the point of view on the existence of a democratic deficit depends on the model which is used, as each has its own legitimating mechanisms and expectations for the European Parliament. As we shall see, the democratic deficit comes through in its strongest form under the federal model, whereas the other two models either do not see a deficit or even regard a European level democracy as counterproductive. Towards the end of Chapter One, the thesis takes the first steps in setting out a possible course for future action to democratise the Union. This involves investigating both the nature of democracy as well as suggesting a democratic model for the EU to address the democratic deficit under the federal model. Chapter One contributes to the literature by investigating Parliament's role in legitimising the EU through the lens of the three models and by analysing the kind of democracy needed to remedy the democratic deficit.

Whereas Chapter One analyses the EP in the context of legitimacy, Chapter Two makes an interdisciplinary contribution by combining a value free positive

political science on the one side and a normative legal approach on the other. This chapter deepens the interdisciplinary element of this thesis, while at the same time focusing down more sharply on the federal model. Whereas a good deal of legal analysis is either explicitly based on a federal model of the European Union or implicitly premised on such an approach, detailed analysis of the implications of federalism for EU level democracy is much less common. Indeed, arguably the particular requirements and characteristics of an effective democratic system for the EU level have not yet been clearly identified as a subject worthy of sustained legal analysis. In order to identify and start to address the issues at stake in the design of an appropriate electoral system for (a federal model of) the EU, I will, therefore, draw on other social sciences and in particular on political science. As we shall see, there is an extensive body of political science literature on democratic legitimacy. While some of this literature has a normative and philosophical quality, much of it is technical in character. In particular, a large literature addresses in detail the particular forms that electoral systems and law can take within democratic systems. It is worth stressing that it is generally agreed that the choice of electoral system has major consequences for the form and character of a democracy – in terms of the patterns of representation and dynamics of legitimacy it would generate. While the political scientists who specialise in this area are well aware of the political implications of electoral systems, we shall see that they show a striking reluctance to recommend a particular system. Chapter Two makes two significant contributions to the development of the thesis. First, it demonstrates the crucial role that electoral systems play shaping the democratic form and character of a political system. The Chapter addresses electoral systems and their consequences, in particular the

impact of electoral systems on voting behaviour and on representation is assessed before summarizing their role in the generation of democratic legitimacy. The chapter then turns more explicitly to the normative questions that attach to the choice of electoral system. As we shall see, while empirically-oriented political scientists are typically more reluctant than legal scholars to be drawn into normative debates, they have not been able to exclude such value-laden questions from the literature at least to the extent that they recognise that the choice of an electoral system will be contingent on the particular vision of democracy preferred by an actor or group or chosen for a political system. It can be argued that if agreement can be achieved on a preferred model of political system, then the question of which electoral system suits it best is begged. Second, Chapter Two offers legal scholars a novel interdisciplinary account of the significance of electoral systems to the democratic legitimacy of the European Union. By drawing systematically upon the political science literature, this thesis joins a well established tradition of legal scholars using political science to expand and deepen our understanding of the EU, but does so in the novel, and particularly technical, field of electoral systems and laws. Chapter Two reviews the political science literature on electoral systems and presents a rare example of such social science material being substantially and systematically drawn upon in a legal PhD. This is an interdisciplinary methodology, which makes a novel contribution to the legal literature on the democratic deficit in the European Union. Finally, this interdisciplinary work sets the stage for the empirical analysis of the history of electoral reform and debates around electoral reform in the EU that follows in the next chapters.

Before being able to develop an ideal type electoral system, this thesis develops an analysis of the history of electoral law for the European Parliament, its implications, and on debates around a reform of electoral systems. Chapter Three analyses the current system of electoral laws for elections to the European Parliament and its implications. As we shall see, European Parliament elections do not operate on one uniform system, but on a variety of highly different national legislation. Despite the option in 1952 of having a directly elected assembly in the ECSC Treaty and the Treaty obligation of the EEC Treaty since 1957 for a uniform electoral system, European Parliament elections continue to operate on the bases of 28 different national electoral systems in the 27 member states. Chapter Three makes an original contribution to the existing legal and political science literature by examining Parliament's attempts to become directly elected as well as the search for a uniform system through the lens of the three overarching models of the EU, introduced in Chapter One: that of the EU as an international organisation, a supranational technocratic regime, and the EU as a federal model.

The thesis then proceeds to further analyse the democratic deficit by exploring the current system of electoral laws in elections to the European Parliament. Because the European Parliament's website as well as major publications on the matter have shown divergences from the actual systems operating across the European Union on several occasions, Chapter Three presents an accurate account of key aspects of the different national electoral laws. As we shall see when the most recent research available on electoral behaviour is analysed, European Parliament elections are still a set of second-order national elections. However, research

suggests that European elections can provide legitimacy according to the federal model if the electoral system is amended to generate competition between European parties on European matters.

To fully comprehend the electoral system in place today, and the European Parliament's attempts on electoral reform, the thesis explores in depth the history of the European Union's electoral system, taking as the start point debates surrounding the origins of the European Coal and Steel Community and tracing them through to the present. This extensive and detailed account of the history of the EU electoral system draws on a huge body of primary sources to which access was facilitated through the support of MEPs and their advisors, of services of the European Parliament and European Documentation Centres in a number of member states. These primary sources include Reports and further official documents on electoral systems of member states, ranging from the early fifties to today. The collection and analysis of this material forms another original contribution made by this thesis to the existing literature.

Chapter Four analyses recent developments in the field of electoral reform in the European Parliament, and begins the task of assessing Rapporteur Duff's proposals to amend the 1976 Elections Act. In particular, and drawing on the models of the EU initially presented in Chapter One, Chapter Four investigates the model Rapporteur Duff applies to the EU and which manifests itself in the reform proposals. Hereinafter the democratic vision and corresponding electoral system of the Rapporteur shall be analysed. Chapter Four closes with a comparison of Duff's model with the current system of electoral laws. In terms of

methodology, Chapter Four draws on qualitative research methods, including textual analysis of primary source materials as well as interviewing key actors in the reform debates. With regards to these more contemporary debates, access was secured to original primary documentary sources which included all Reports issued by Andrew Duff as Rapporteur in their different drafts stages of development, as well as those proposals which were never realised. This contributes to the presentation of a detailed and exclusive contemporary account of the attempted reform process. Furthermore, elite interviewing provided information on the reform proposals which is not to be found in published documents or press releases. The overall picture has been complemented by following press conferences, parliamentary sessions and media coverage on the attempted reform of amending the 1976 Elections Act. More specific details about this research process, the selection of interviewees and the format of the interviews is given in Chapter Four, which provides an original contribution to European electoral system research.

Chapter Five moves on from the historical analysis of Chapter Three and the analysis of current developments in the field of electoral reform in Chapter Four to consider more recent debates on the electoral system, triggered by the Duff Reports. As we shall see, actors utilise electoral system reform to address the democratic deficit in different ways. Many of the positions to Duff's proposals reflect differences over their proponent's underlying vision or model of democracy as much as technical disagreements about elements of the electoral system. Different models of the EU further amplify diverging positions on the need for and the details of electoral reform. Elite interviewing formed an

important part in the analysis of Chapter Five, in addition to the following of all relevant debates in Parliament and its committees. In most cases, interviews were conducted on location in Brussels. I sought to speak to a variety of actors with expertise on the matter to reflect as representative a range of opinions as possible. In particular, coordinators of the political groups in Parliament for the Constitutional Affairs' Committee were useful sources in that respect, as were other Members of Parliament with expertise and long-term involvement with the subject.

Chapter Six then changes from analysis of historical and contemporary debates on electoral reform to normative proposal and offers an outline of an ideal type electoral system for a federal model of the European Union. The suggested ideal electoral model for European Parliament elections does not simply follow any of the proposed electoral systems discussed in the previous Chapters, because it is consequently build on the premise of promoting and facilitating democratic legitimacy in the European Union conceived of as a federal system. It does, however, take into account both Duff's own proposals and the various positions articulated in the debates in so far as these meet those criteria. Ultimately, the Chapter delivers a legislative proposal for an electoral system for the European Union. This Chapter further develops the normative proposal to address the democratic deficit of the federal model and then presents a translation of the ideal type into core elements of a draft European Electoral Act, a new uniform voting system for elections to the European Parliament. This ideal electoral system is similar to some proposals of Duff and debates in Parliament, but also significantly differs in key aspects. By delivering this normative proposal, this thesis makes a

further contribution to the study of European electoral systems. The analysis from both the perspective of law and the perspective of political science of electoral systems of the democratic implications for the legitimacy of the European Parliament and the European Union more generally of a particular electoral system, and of alternative electoral systems, represents a new approach to the study of electoral systems. The democratic legitimacy of the European Parliament and the European Union under a federal model depends on the particular form of the electoral system.

Methods

As may be apparent from the description of this project so far, this thesis incorporates theoretical, empirical and normative elements. In terms of its theoretical dimension, the theoretical element includes discussions of major models used across legal scholarship and social science to conceptualize the EU, as well as a more detailed engagement with the theoretical literature on electoral systems from political science.

Empirically speaking, the thesis mainly uses historical analysis, building a comprehensive archive of materials on history of debates and proposals for electoral reform since the creation of the ECSC, together with elite interviews with participants on more contemporary debates on electoral reform. The historical analysis is undertaken for a better understanding of the development of both direct elections to the European Parliament and the coming into existence of a system of diverging national electoral legislation. Semi-structured interviews were conducted to obtain specialist knowledge of actors and to gain information on different perspectives in Parliament, which could not have been gleaned from

official documents or media coverage.² Considerable time was spent at the European Parliament, and observation of parliamentary committee sessions was also undertaken.

In terms of normative analysis, against a backdrop of a systematic analysis of existing and historical proposals for reform of Parliaments electoral system, an ideal typical proposal for an electoral system is made together with a draft model electoral law statute.

Having introduced the core business of the thesis and each chapter within it, the thesis shall now turn to analyse the European Parliament's role in the context of democratic legitimacy in Chapter One.

² D. G. Lilleker, "Doing Politics: Interviewing the Political Elite: Navigating a Potential Minefield", *Politics*, 2003, Vol. 23, No. 3, pp 207-214, p 208; D. Richards, "Elite Interviewing: Approaches and Pitfalls", *Politics*, 1996, Vol. 16, No. 3, pp 199-204, p 199.

CHAPTER ONE

THE EUROPEAN PARLIAMENT IN THE CONTEXT OF DEMOCRATIC LEGITIMACY OF THE UNION

Introduction

Chapter One investigates the European Parliament's role in providing legitimacy to the European Union. The chapter shall first deal with the question whether the European Parliament can be called a parliament by looking at how far it fulfils the major functions of a Parliament. Accepting the difficulty of using models originally developed for the national level, Section 1 analyses the nature of the European Parliament along the catalogue of functions performed by parliaments, which include the formation of government, supervisory functions, legislative functions, and budgetary functions. Depending on a differing emphasis of the four elements of the catalogues of functions of parliaments, the role or style of a parliament can be grouped into that of a working parliament or a debating parliament. Is the European Parliament closer to the ideal of a working parliament or to that of a debating parliament? The internal organisation of parliaments and the role of committees further define the kind of parliament according to these two models.

Second, this Chapter addresses the different models used by legal and social science analysts in the study of the EU, looking in particular at the modes of legitimation they imply – and whether or not EU level democracy is a significant element of the legitimation of the EU that each suggests. Section 2 identifies three different models of the EU, as the potential legitimating role of Parliament under each will differ. The models of the European Union as an international organisation, a supranational technocratic regime and as a federal model are applied, introducing relevant integration theories as well as corresponding legitimating mechanisms. Whereas the European Parliament has no or hardly any

role to play as a means of legitimation among those who regard the European Union as an international organisation or as a supranational technocratic regime, legitimation under a federal model requires a directly elected European Parliament as its key institution. Having identified the different sources of legitimacy under the three models, I shall investigate the matter of the existence of a democratic deficit in the European Union under each of the three models. To proponents of the international organisation model of the EU, the democratic deficit is either non-existent or not a matter for the European Parliament. Under the supranational, technocratic model, again, no democratic deficit can be discerned, especially none to which the European Parliament can be a remedy. Despite the European Parliament is being regarded as the central legitimating mechanism for the European Union under the federal model, it fails to address the democratic deficit identified under this model.

In Section 3, I shall begin to address the question of what can be done to make a difference. As a start, an analysis of the very possibility of democracy on the European level is presented. Hereafter, I look for support in the EU's constitutional order as well as in the case law of the European Court of Justice for democracy under the federal model, before turning to the matter of choosing a democratic model for the European Union, a matter that treaties and case law remain silent on. Liberal democracies have produced different institutional types, such as *majoritarian* or Westminster and *consensus* or federal democracies for example.³ I shall deploy the majoritarian and the consensus models of democracy

³ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press 1977); *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984); *Electoral Systems and Party*

to the EU to examine the nature of democracy in Europe and address the democratic deficit under the federal model. The various issues and dimensions of European democracy and definitions and roles of parliament in a democracy discussed in this chapter relate to one another, although there is no one to one correspondence between the position of a political system along the continuum of consensus and majoritarian democracies and the form of Parliament. It is nevertheless important to discuss some of the ways in which Parliaments are identified, and this includes different functions of the parliaments.

To begin, I investigate the nature of the unique institution of the European Parliament.

1. What is the European Parliament?

The European Parliament is a transnational, directly elected body. It is the world's first and most significant attempt in institutionalising democracy beyond the nation state, making it a unique entity. Today, the European Parliament represents half a billion EU citizens in 27 member states, its deputies are chosen by an electorate of about 375 million. The chamber is not a static institution but continues to change and has experienced the most dynamic development of Europe's institutions in the last sixty years, both in terms of its composition and with regards to its competences. The EP started out with parliamentarians, then called Assembly Members in 1952, delegated from the six founding member states for a term of one year, and developed to a House of directly elected

Systems: A Study of Twenty-Seven Democracies 1945-1990 (Oxford: Oxford University Press 1994); *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press 1999).

Members coming from the current 27 member states. During that time period, the European legislature grew considerably by size from 78 AMs to 751 MEPs. The European Parliament moved from renting premises in Strasbourg that it shared with the Parliamentary Assembly of the Council of Europe to becoming the effective owner of two substantial building complexes in Brussels and Strasbourg, with administrative offices in Luxembourg.⁴ The Assembly, called Parliament from 1962 onwards, originally functioned as an advisory body, the Council being the final decision-making institution. Today, Article 14 (1) TEU reads that the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. A shift in Europe's power structure started with the two budgetary treaties of 1970 and 1975. The Treaty of Luxembourg allocated the EC its own financial resources and Parliament the right to object the budget as a whole. Another landmark occurred with first direct elections in 1979. Until the ratification of the Single European Act, Parliament had to be consulted if the relevant Treaty Articles provided for that procedure in accordance with the consultation procedure. The situation changed when the Cooperation and Assent procedures were introduced by the SEA in 1986, giving the European Parliament a greater role in the legislative process. The biggest step in increasing powers of the European Parliament was reached with the introduction of Art. 251 EC and the Co-Decision procedure. Co-Decision, established by the Treaty of Maastricht in 1992, and further expanded under Amsterdam and Nice, placed the European Parliament on an equal footing with the Council, to become the ordinary

⁴ M. Shackleton, "The European Parliament", in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union* (2nd edition Oxford University Press, Oxford 2006), 104-124 at p 105.

legislative procedure under the Lisbon Treaty.⁵ If consensus cannot be reached between Parliament and Council then, legislation fails. The scope of the ordinary legislative procedure has been extended to more than forty further areas with the Lisbon amendments.⁶ Under the consent procedure, originally called the assent procedure and renamed and expanded under Lisbon, Parliament's consent is mandatory in several fields, such as the accession of new member states and electoral reform.⁷ Article 36 TEU entails an only limited role of the EP in the field of Common Foreign and Security Policy. The High Representative consults the European Parliament on the main aspects of CFSP and must take the views into account. Especially the ordinary legislative procedure has elevated the European Parliament to become a central actor next to the Council in the legislative process, making the chamber's powers similar to those of national parliaments. The European Parliament played an active role in reaching Treaty changes in its favour, partly at interinstitutional conferences, but also in choosing the judiciary path. The interaction between the EP and the European Court of Justice resulted in following treaty amendments taking account of the Court's judgements. Cases brought before the Court centred on the European Parliament's role in the legislative process as well as on the choice of legislative procedure and the chamber's part in annulment proceedings.⁸

⁵ Articles 289 and 294 TFEU.

⁶ For a full list of subject areas to which the ordinary legislative procedure applies, please refer to Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (London: John Harper Publishing, 8th edition 2011), pp 248, 249, 250.

⁷ Article 49 TEU, Article 223 (1) TFEU; for a full list of subject areas to which the consent procedure applies, please refer to Richard Corbett, Francis Jacobs and Michael Shackleton, *op.cit.*, pp 256, 257.

⁸ Case 138/79 *Roquette Frères v Council* [1980] ECR 3333; Case 139/79 *Maizena v Council* [1980] ECR 3393; Case C-22/96 *European Parliament v Council (Telephonic Networks)* [1998] ECR I-3231; Case C-42/97 *European Parliament v Council (Linguistic Diversity)* [1999] ECR I-869; Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041; Case C-187/93 *Parliament v Council (Transfer of Waste)* [1994] ECR I-2857; Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339.

But is it appropriate to call the European Parliament a Parliament? It was not named such in the early years of its existence when it was simply a consulting assembly of delegated members. Taken the term of Parliament, what characteristics would we expect it to have, and which ones does it have? Accepting the difficulty of using models originally envisaged for the national level, I shall analyse the nature of the European Parliament. Parliaments fulfil certain functions and roles, including the formation of a government, supervisory functions, legislative functions, and its budgetary powers.⁹ Parliament may consist of one or two houses and in democratic states the members of Parliament in at least one chamber are directly elected in free elections. Due to this direct form of democratic legitimation, parliaments perform a function of particular importance in legitimising the dealings of the executive. Depending on a differing emphasis of the four elements of the catalogues of functions of parliaments, their role or style can be grouped, following Max Weber's and Winfried Steffani's widely used framework, into that of working parliaments and debating parliaments.¹⁰ I shall, however, first determine the nature of the chamber and determine whether it can be called a parliament along the catalogue of functions, before attending the matter of the particular style of the European Parliament. Considerable research has already been undertaken on the role and competences of the European

⁹ K. Schubert and M. Klein, *Politiklexikon* (4th edition Bundeszentrale für politische Bildung, Bonn 2006), p 224.

¹⁰ M. Weber, "Parlament und Regierung im neugeordneten Deutschland", in M. Weber, *Gesammelte politische Schriften* (Tübingen: Mohr-Siebeck, 3rd edition 1971), p 350; W. Steffani, "Amerikanischer Kongreß und Deutscher Bundestag", in W. Steffani, *Parlamentarische und präsidentielle Demokratie: Strukturelle Aspekte westlicher Demokratien* (Opladen: Westdeutscher Verlag 1979), pp 333, 334; C. Lord, *Democracy in the European Union* (Sheffield: Sheffield Academic Press 1998), p 65; Philipp Dann, "Looking through the federal lens: The Semi-parliamentary Democracy of the EU", Jean Monnet Working Paper 5/02, p 21.

Parliament.¹¹ In this Section, I shall limit myself to answering the question: Can Europe's legislature be named a parliament and if so, what kind of parliament is it?

In my analysis of the nature of the EP, I shall start off with the functions of government formation and supervisory functions. A government with a stable majority in Parliament does not depend on the European Parliament. However, a constitutional interaction between the executive in the form of the European Commission on the one side and the EP on the other does exist, showing the EP's supervisory role. One of the main tasks of the European Parliament is holding the executive to account. Article 234 TFEU gives Parliament the right to censure the Commission, and it can require the members of the Commission and the High Representative of the Union to resign as a body. The latter has not been used by the EP so far, but motions of censure have been used before the collective resignation of the Santer Commission in March 1999. Coming back to the EP's role in government formation, its powers are not just of a negative nature, the chamber also has had a role in the appointment of the Commission from Maastricht on: under Article 14 (1) S.1 TEU, the EP elects the Commission President with a majority of its component members. The President of the Commission, the High Representative, and the Commissioners are subject as a body to a vote of consent in the EP.¹² Committee hearings of candidate

¹¹ Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (London: John Harper Publishing, 8th edition 2011); Martin Westlake, *A Modern Guide to the European Parliament* (London: Pinter Publishers 1994); Gail McElroy, "European Parliament", in Yves Déloye and Michael Bruter (eds), *Encyclopaedia of European Elections* (Houndmills: Palgrave Macmillan 2007); Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation State* (Oxford: Oxford University Press 2005); David Judge and David Earnshaw, *The European Parliament* (Houndmills: Palgrave Macmillan, 2nd edition 2008).

¹² Article 17 (7) TEU.

Commissioners take place in the EP before the vote, and are often of a lengthy and investigative nature. In the run-up to the appointment of the Barroso Commission in 2004, opposition in the EP against several candidates, in particular against Rocco Buttiglione because of his comments on women's and gay's rights, forced Barroso to withdraw his team and present new candidates when he realised that he would lose the vote in Parliament. The European Council proposes a candidate by qualified majority, taking into account the results of European Parliament elections. The European Council also formally appoints the Commission by qualified majority. With regards to the supervisory function of the European Parliament, the practice of committees of inquiry and the right of petition has been enshrined in the Treaty of Maastricht and are now contained in Articles 226 and 227 TFEU. To foster the connection between citizens and the EU, the Treaty provides for a European Ombudsman to receive petitions from EU citizens and conduct inquiries. The Ombudsman can also start inquiries on his own initiative or due to complaints submitted by MEPs.¹³ EU institutions are to cooperate with the Ombudsman and to give requested information, documents and files. The Complainant must be informed of the outcome of the investigation.

Turning to budgetary functions, a supreme discipline of any Parliament, the European Parliament has considerable power in the adoption of the budget, as enshrined in Article 314 TFEU. Budgetary law, one of the most central and prime competences of any Parliament, has also been used by the EP to urge for changes in distribution of power. The shift in Europe's power structure towards the European Parliament started with the two budgetary treaties of 1970 and 1975.

¹³ Article 228 (1) TFEU.

The Treaty of Luxembourg allocated the EC its own financial resources and Parliament the right to object the budget as a whole. The European Parliament's position in budgetary matters has continuously been strengthened in subsequent Treaty reforms. With regards to the EP's legislative function, the chamber's role has been continuously increased in the course of integration. As has been shown in the historical analysis above, the SEA in 1986 started to allocate the European Parliament a greater role in the legislative process. The introduction of Art. 251 EC and the Co-Decision procedure was a decisive step in increasing powers of the European Parliament. Co-Decision, established by the Treaty of Maastricht in 1992, and further expanded under Amsterdam and Nice, placed the European Parliament on an equal footing with the Council, to become the ordinary legislative procedure under the Lisbon Treaty.¹⁴ If consensus cannot be reached between Parliament and Council then, legislation fails. The scope of the ordinary legislative procedure has been extended to more than forty further areas with the Lisbon amendments.¹⁵ Under the consent procedure, originally called the assent procedure and renamed and expanded under Lisbon, Parliament's consent is mandatory in several fields, such as the accession of new member states and electoral reform.¹⁶

Addressing our key question 'is it appropriate to call the European Parliament a Parliament', I submit that its legislative functions and its budgetary powers conform to the catalogue of functions for parliaments. In its supervisory function

¹⁴ Articles 289 and 294 TFEU.

¹⁵ For a full list of subject areas to which the ordinary legislative procedure applies, please refer to Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (London: John Harper Publishing, 8th edition 2011), pp 248, 249, 250.

¹⁶ Article 49 TEU, Article 223 (1) TFEU; for a full list of subject areas to which the consent procedure applies, please refer to Richard Corbett, Francis Jacobs and Michael Shackleton, *op.cit.*, pp 256, 257.

and its role in the formation of the executive, the European Parliament's role has been increased continuously. The highly dynamic development of the European Parliament has shown considerably strengthened legislative, supervisory and budgetary powers, and an increased role in the appointment of the Commission, making it more and more similar to a national Parliament. As the European Parliament is a transnational parliament, it should also be noted that MEPs are organised in political groups according to political colour, not to nationality, in the same way as national parliaments. When the Common Assembly first met in 1952 at Strasbourg University, AMs of similar political orientations started working together in political groups. In 1953, the chamber's Rules of Procedure were changed to accommodate supranational groups, seating in alphabetical order was changed to seating by political groups. At current, there are seven different political groups in Parliament and several non-attached members.¹⁷ As envisaged in Article 224 TFEU, the organisation of European political parties has been dealt with by means of regulation.¹⁸ The process has been heavily contested, and members of political parties are not entirely congruent with that of political groups. In effect, the current legal framework effectively prohibits European political parties from campaigning and reduces them to the status of conference organisers.

The internal organisation of the European Parliament also corresponds to national parliaments. According to Rule 22 (1) of the Rules of Procedure of the European

¹⁷ European Parliament, *MEPs by Member States and Political Groups*, URL website <http://www.europarl.europa.eu/meps/en/search.html>, on web 27 December 2012.

¹⁸ Regulation 2004/2003 EC of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding [2003] OJ L 297/1; [2008] OJ C 252/1.

Parliament, Parliament's Bureau consists of its elected President and 14 Vice-Presidents.¹⁹ As laid down under Rule 23, the regulatory tasks of the Bureau entail the chamber's budget, administrative, organisational and staff matters. Five Quaestors, who are dealing with administrative and financial matters of MEPs, assist the Bureau, Rules 16 and 26.²⁰ The political governing body of Parliament is the Council of Presidents. It is comprised of the President of the European Parliament and the parliamentary group leaders.²¹ As laid down in Rule 25, its tasks include setting up the agenda for plenary sessions, fixing the timetable for the work of parliamentary bodies and establishing the terms of reference and size of parliamentary committees and delegations. Disregarding the disadvantage of sitting in 23 different languages instead of one like most national parliaments,²² the European Parliament has managed the transition from 'fig-leaf to co-legislature'.²³ As Corbett *et al.* put it, the EP 'is not a rubber stamp legitimising a government's legislative wishes'²⁴ and has made its journey to getting on equal terms with the Council. It has initiated new legislation, and under the Lisbon Treaty gained the right of initiative in connection with a revision of the Treaties, Article 48 (2) TEU. Apart from passing laws, the EP is involved in the drafting process of law-making and forms part of the 'institutional triangle', a term virtually unused two decades ago referring to the European Union's constitutional

¹⁹ European Parliament, *Rules of Procedure*, URL website <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>, on web 27 December 2012.

²⁰ Rules 16 and 26.

²¹ Rule 24.

²² Each of the 23 languages can be translated into 22 others, this makes 506 possible combinations, URL <http://www.europarl.europa.eu/aboutparliament/en/007e69770f/Multilingualism.html>, on web 16 December 2012.

²³ R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (London: John Harper Publishing, 8th edition 2011), p 3.

²⁴ Richard Corbett, Francis Jacobs and Michael Shackleton, *op.cit.*, p 271.

framework.²⁵ Functions of the European Parliament conform to the catalogue of functions developed in the context of national Parliaments. A different emphasis of the four functions can result in different kinds of parliaments. I shall therefore now turn to analyse the style of the European Parliament.

The role and style of parliaments can, following Max Weber's and Winfried Steffani's widely used framework, be analysed by the definitions of working parliaments and debating parliaments:²⁶

- A working parliament, apart from passing laws, is involved in the drafting process of law-making and in tabling bills. The main body of its work takes place in parliament's committees.
- A debating parliament is more limited to passing laws, leaving their elaboration mainly to the executive.

Both types are ideal models of parliaments and can be found to a greater or lesser degree among parliamentary democracies. The internal organisation of parliaments and the role of committees further define the kind of parliament according to these two models. For example, the House of Commons in the UK is according to Walter Bagehot the classic example of a debating parliament.²⁷ The role and functions of the House of Commons include the support of government

²⁵ *Ibid.*

²⁶ M. Weber, *op.cit.*, p 350; W. Steffani, *op.cit.*, pp 333, 334; C. Lord, *op.cit.*, p 65; Philipp Dann, *op.cit.*, p 21.

²⁷ W. Bagehot, *The English Constitution* (Sussex: Academic Press 1997 (1865)).

and sustaining the government in power by passing its legislation.²⁸ It is the centre of debate in the parliamentary system of the United Kingdom. On the other hand, the Federal Republic of Germany's *Deutsche Bundestag* is more difficult to situate in this framework. Tasks performed by the *Bundestag* include the legislative process and the parliamentary scrutiny of the government and its work. The *Bundestag* decides on all laws that fall within the sphere of competence of the German Federation. Members of Parliament as well as parliamentary groups are entitled to initiate legislation. Hardly any bills presented by the Federal government emerge unscathed from the committee stage, regardless of the seat distribution in the committees. Among the key instruments of scrutiny are the budgetary powers. One of the most prominent powers of Parliament is the election of the German Federal Chancellor.²⁹ Equally, Germany's parliament is the main forum for democratic discussion. The *Bundestag* has elements of both working and debating parliaments and is more of a hybrid character. Consequently, it has been named a debating working parliament.³⁰ A classic example of a working parliament is the US Congress, where no government depends on a majority in the two chambers of the US Congress. The main body of work takes place in the committees.

As it is the case in most working parliaments, the EP's main body of work is organised in twenty standing committees, ranging from matters such as foreign

²⁸ D. Oliver, "The 'Modernization' of the United Kingdom Parliament?", in J. Jowell and D. Oliver (eds.) *The Changing Constitution* (6th edition 2007 Oxford University Press) 161 - 184, at p 165.

²⁹ H. Schreiner and S. Linn, *The German Bundestag - Functions and Procedures* – (Rheinbreitbach: Neue Darmstädter Verlagsanstalt, 2006), 15.

³⁰ W. Steffani, "Parties (Parliamentary Groups) and Committees in the Deutsche Bundestag", in U. Thaysen, R.H. Davidson and R.G. Livingston (eds.), *The US Congress and the German Bundestag* (Boulder: Westview Press 1990), pp 275, 278.

affairs, budgets, economic and monetary affairs, employment and social affairs, environment, public health and food safety, to culture and education, women's rights and gender equality to constitutional affairs.³¹ Due to its strong legislative and budgetary function, the European Parliament is involved in the drafting process of law-making and in tabling bills in accordance with the models of working parliaments. The main body of its work takes place in parliament's committees and, similar to the US Congress, the European Parliament does not generate a permanent majority to support a government. The European Parliament comes closer to the ideal of a working parliament, but a large share of the elaboration of legislation is also conducted by the Commission. At times, Parliament can be the forum of fierce debates, for example prior to the appointment of the Commission, during negotiations of the budget, or when it comes to constitutional matters such as electoral reform. Along the continuum of working and debating parliaments, the European Parliament can be placed somewhere between an ideal working parliament and, for example, the *Deutsche Bundestag*, due to its increased role in appointing the Commission. Having identified the EP first as a Parliament and second as a variant of a Working Parliament, I shall analyse Parliament's role as a legitimating mechanism in the following Section 2.

2. Models of the EU and their place for the European Parliament

National parliaments are significant legitimating mechanisms of national polities. In this Section, I shall explore the question of the European Parliament's legitimating function in the European Union. As a first stage in this, I start with

³¹ European Parliament, *List of Committees*, URL website <http://www.europarl.europa.eu/committees/en/full-list.html>, on web 27 December 2012.

identifying different models of the EU, as the potential legitimating role of Parliament under each will differ. Each model will advance its own understanding of the core legitimating mechanism(s) and in that regard will advance a greater or lesser role to the EP.

To understand the politics and policy-making of the European Union, the observer needs to look well beyond the structure and institutions established by the treaties.³² This translates into: what sort of entity is the European Union and how should it be studied?³³ The task of theories is to offer ways of organising our thoughts about what is going on in this context. As Rosamond puts it, we might continue to be confused about the complexity of the EU, but at least confused in a reasonably sophisticated way.³⁴

Integration theory tries to offer an explanation not just for what is happening, but also for how and why it is happening.³⁵ Theories may help to explain processes and outcomes of integration, which not only leads to a better understanding of the current set of institutions, but also helps to formulate expectations about future developments and institutional behaviour.³⁶ Moreover, questions of democratic reform and legitimacy also require a deeper understanding of the normative issues

³² W. Wallace, “Less than a Federation, More than a Regime: the Community as a Political System“, in H. Wallace, W. Wallace and C. Webb (eds.), *Policy-Making in the European Community*, 2nd edition (Chichester: John Wiley & Sons 1983), p vii.

³³ B. Rosamond, “New Theories of European Integration”, in M. Cini and Nieves Pérez-Solórzano Borrágán (eds.), *European Union Politics*, 3rd edition (Oxford: Oxford University Press 2010), p 121.

³⁴ B. Rosamond, *ibid.*

³⁵ A. Wiener and T. Diez, *European Integration Theory*, 2nd edition (Oxford: Oxford University Press 2009), p 3.

³⁶ A. Wiener and T. Diez, *op.cit.*, p 4.

at stake, i.e. what should legitimacy be based on, what form of democracy is appropriate for a polity beyond the nation state?³⁷

First, the main models of integration theory need to be identified. What are the main models into which we can divide up the European Union; in analogy to Wallace's question, what sort of animal is the European Union? Is it a 'federation in the making, a well developed framework for the management among governments of complex interdependence or a hybrid which cannot easily be identified?'³⁸ In this section, I shall investigate in turn with the help of integration theory whether we can classify the European Union as an international organisation, a supranational technocratic regime or as a federal model. Under each of these three sections I shall deal with the relevant integration theories as well as the respective legitimating models. As the focus of this thesis is on the European Parliament, I shall then turn to an evaluation of the existence of a democratic deficit under the international organisation model, the supranational, technocratic model and the federal model and the proposed remedies.

2.1 The EU as an International Organisation

An international organisation can be defined as a 'body that promotes voluntary cooperation and coordination between or among its members, but has neither autonomous powers nor the authority to impose its rulings on its members'.³⁹

NATO, the OSCE and the WTO may serve as examples. Intergovernmentalism,

³⁷ A. Wiener and T. Diez, *ibid.*

³⁸ W. Wallace, *op.cit.*, p 403.

³⁹ J. McCormick, *Understanding the European Union: A Concise Introduction*, 3rd edition (Houndmills: Palgrave Macmillan 2005), p 4.

one of the so-called ‘grand theories’ of integration,⁴⁰ regards the EU as an international organisation. Although intergovernmentalism acknowledges the role of non-state actors, it sees national governments as the main actors deciding on the pace and nature of European integration. In the intergovernmentalist view, solely national governments have the political legitimacy that comes from being elected to determine the pace of integration.⁴¹ This school regards the protection of national interests as the main objective of national governments. The European decision-making process constitutes a zero-sum game, in which ‘losses are not compensated by gains on other issues: nobody wants to be fooled’.⁴²

A further development of the intergovernmentalist approach has been the school of liberal intergovernmentalism in the 1980s and 1990s. Liberal intergovernmentalism is associated with scholars such as Taylor, Keohane and Moravcsik.⁴³ It combines the importance of domestic politics with the role of national governments in the EU decision-making process. Because of domestic economic interests, member states’ governments pursue integration via intergovernmental bargains. In this twofold process, economic and social actors first compete for their interests to be represented by national governments on the

⁴⁰ S. Hix, *The Political System of the European Union*, 2nd edition (Houndmills: Palgrave Macmillan 2005), p 14.

⁴¹ S. Hoffmann, “The European Process at Atlantic Crosspurposes”, *Journal of Common Market Studies*, Vol.3, 1964, pp 85-101.

⁴² S. Hoffmann, “Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe”, *Daedalus*, Vol.95, No.4, pp 862-915.

⁴³ P. Taylor, “Intergovernmentalism in the European Communities in the 1970s: Patterns and Perspectives”, *International Organization*, Vol.36, No.4, pp 741-766; R.O. Keohane and J.S. Nye, *Power and Interdependence: World Politics in Transition*, 2nd edition (Boston: Little, Brown 1989); A. Moravcsik, “Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community”, *International Organisation*, 1991, Vol. 45, pp 19-56; “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach”, *Journal of Common Market Studies*, 1993, Vol.31, No.4, pp 473-524; “Why the European Community Strengthens the State: Domestic Politics and International cooperation”, paper presented to the Conference of Europeanists, Chicago, April 1994; *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press 1998).

EU-level. Intergovernmental bargaining leads to the implementation of EU policies in phase two. Intergovernmentalism regards states as unitary actors. In accordance with classic realist theory, supranational institutions had only a limited effect on EU decision-making. Liberal intergovernmentalism regards national governments as the main actors too, but considers economic interests to be their dominating motivation. Due to a plurality of interest groups within states, national governments' positions on European integration can fluctuate.⁴⁴ Whereas a member state may be in favour of a 'European approach' at one policy issue, it may decide against in another field, depending on where its interests lie. In the European decision-making process, Moravcsik awards national governments a certain degree of 'agency-slack'.⁴⁵ When societal actors (the principles) transfer power to their governmental agents, governments can at times make use of a confined discretion. The more contentious a policy field is among interest lobby groups etc., the more discretion a government has in the decision-making process. National governments can take divided domestic interests to the advantage of the state by using EU institutions to overcome domestic opposition.⁴⁶ That way, intergovernmentalism regards the EU as a tool to strengthen nation states rather than weakening it.⁴⁷ Magnette follows this line of argument. He argues that the European Union should be seen primarily as an international organisation, albeit a sophisticated one, rather than as a political system.⁴⁸ The institutional structure, decision-making procedures and the behaviour of the actors involved in European

⁴⁴ A. Moravcsik, *op.cit.* 1993, p 483.

⁴⁵ A. Moravcsik, *op.cit.* 1993, p 488.

⁴⁶ A. Moravcsik, *op.cit.* 1993, p 515.

⁴⁷ A. Moravcsik, *op.cit.* 1994, p 47.

⁴⁸ P. Magnette, *What is the European Union? Nature and Prospects* (Houndmills: Palgrave Macmillan 2005), p 3.

cooperation show the marks of the EU's intergovernmental origins.⁴⁹ The EU is a set of institutions and rules designed to strengthen the European states by encouraging them to cooperate.

What are the central legitimating mechanisms according to intergovernmental theories and what role do they ascribe to the European Parliament in providing legitimacy? Intergovernmentalism regards national governments as both the central actors in European decision-making as well as the primary source of legitimacy. As a result, it ascribes a very limited role to the European Parliament in legitimating the EU. National elections, legitimising the national Member State governments, are the key, and not elections to the European Parliament. As a supranational institution, the EP is beyond member state control. The very existence of the European Parliament appears to contradict liberal intergovernmental axioms: the principal-agent relationship advanced by this theory assumes that it is national governments that bargain for their policy preferences, but the EP is avowedly a limitation of Member States' room for manoeuvre.⁵⁰

Liberal intergovernmentalism, regarding the EU as an international organisation, ascribes hardly any role to the European Parliament as a legitimating mechanism. It is, however, not the only view trying to give an explanation for the European integration process, and is not accepted by all. Others approach the EU as a supranational technocratic regime, transcending the interests of Member States

⁴⁹ P. Maignette, *op.cit.*, p 3.

⁵⁰ P. Craig, "The Nature of the Community: Integration, Democracy and Legitimacy", in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, pp 1-54, p 11.

governments. They put forward very different legitimating models for the European Union. I shall now continue to investigate the EU as a supranational technocratic model and explore another ‘grand theory’, functionalism, as well as governance models of European integration, before I turn to a federal model.

2.2 The EU as a Supranational, Technocratic Model

In this section, I shall analyse legitimating mechanisms of integration theories that regard the EU as a supranational, technocratic model. In particular, neo-functionalism and governance approaches such as multilevel governance, supranational governance and policy-network analysis are evaluated with regards to their legitimating emphasis.

Functionalism and Neofunctionalism

In the early days of the European Community neo-functionalists were fairly confident that they could provide an overarching conceptualization of the integration process.⁵¹ They did not see the Community as a new system of government, and regarded the failure of the European Defence Community as an explicit rejection of the federal model. In harmony with Monnet’s technocratic approach, they saw the Community as a new and singular system, neither international nor national, but supranational.⁵²

The functional model tries to explain the Community’s characteristic patterns of policy-making. Mitrany did not originally conceptualise the theory of functionalism in relation to the European integration process at all, but envisaged

⁵¹ W. Wallace, *op.cit.*, p 403.

⁵² W. Wallace, *op.cit.*, p 404.

a universal concept of securing world peace.⁵³ Rather, he rejected regional integration and regarded nationalism and territorial organisation of power as a threat to world peace.⁵⁴ Peace could not be secured if the world was to be organised by what divides it. Replacing nationalism at the nation-state level by nationalism at the European level would not help to foster world peace. Mitrany promoted the principle of ‘technical self-determination’ via rules and experts, instead of territorial structures and national politics.⁵⁵ Thereby, a decline of ideological conflicts and of nationalism would lead to peaceful cooperation. When creating the European Coal and Steel Community, Monnet and Schuman used Mitrany’s functional approach by following a technical integration, focusing on specific sectors. But at the same time they also pursued a form of European regional integration contrary to Mitrany’s approach.

Haas argued that a clear cut between functional issues on the one hand and political issues on the other was unsustainable, because economic integration may be based on political motives as well as generate political consequences.⁵⁶ Neofunctionalists focused on the process of European integration itself. Neofunctionalism, instead of leaving the territorial division of states behind, sought to investigate territorially based organisations at the European level. The concept of political spillover is closely related to neofunctionalism. Political spillover assumes that once different functional sectors are integrated, interest groups will switch from trying to influence national governments to trying to influence regional institutions. Because interest groups would appreciate the

⁵³ D. Mitrany, *A Working Peace System* (Chicago: Quadrangle 1943, 1966).

⁵⁴ D. Mitrany, *op.cit.*, p 96.

⁵⁵ D. Mitrany, *op.cit.*, p 72.

⁵⁶ E. Haas, *The Uniting of Europe* (Stanford: Stanford University Press 1958), p 12.

benefits of integration, they would act as a barrier to a retreat from integration, and politics would increasingly be played out at the regional rather than the national level.⁵⁷

Monnet's approach was technical by nature, with only a limited role for European level democracy. The ECSC was furnished with an Assembly, which consisted of delegated members from the national parliaments. This Assembly was the forerunner of the European Parliament, although it was not before 1979 that the EP was directly elected for the first time. On this model, legitimacy is to be secured through outcomes; it consists, that is, of output-legitimacy. There is a focus on technical experts and the EU is considered a 'Technocracy'. Under the technocratic model of legitimacy, comitology committees can be said to have a legitimating effect to the extent that they can be regarded as efficiency enhancing. Joerges and Neyer argue that comitology represents a supranational political forum.⁵⁸ Committee delegates from the member states would as a team deal with a transnational problem, with the Commission as the coordinator of that process. Because it is the objective of comitology committees to find a 'European' solution, national participants were willing to question their own preferences. Neo-functionalists do not attach a major importance to public opinion, but work from the basis of a 'permissive consensus' with respect to European integration.⁵⁹ Functionalism focuses on output-legitimacy.

⁵⁷ S. George and I. Bache, *Politics in the European Union* (Oxford: Oxford University Press 2000), pp 11-12.

⁵⁸ C. Joerges and J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalization of Comitology" (1997) Vol. 3 No. 3 ELJ 273-299 at p 298.

⁵⁹ L. Lindberg and S. Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Englewood Cliffs, NJ: Prentice Hall 1970), p 41.

Governance approaches: multilevel governance, supranational governance and policy-network analysis

From the 1970s, a turn towards governance approaches occurred in integration theory. This ‘governance turn’ started from alternative premises: with the help of middle range theories instead of grand theories, governance approaches try to explain aspects of the European policy process instead of the whole. As Rosamond puts it, whereas ‘new theories’ of European integration are concerned with the decision-making process, the *telos* of European integration is an irrelevant question for many contemporary scholars.⁶⁰ Effective governance, the matter of how the EU should be governed as well as how it is governed, is of major importance to many new theories.⁶¹

Some contemporary approaches consider the EU as a political system. The concept of ‘supranational governance’ tries to explain the policy-making process in the European Union.⁶² This school works from the assumption that supranational institutions such as the European Parliament have a significant influence on European policy-making, independent from national governments. Member States are not in full control. Governance approaches do not only focus

⁶⁰ B. Rosamond, “New Theories of European Integration”, in M. Cini and N. Pérez-Solórzano Borrágán (eds.) *European Union Politics*, 3rd edition (Oxford: Oxford University Press 2010), pp 104-121, p 108.

⁶¹ B. Guy Peters and J. Pierre, “Governance Approaches”, in A. Wiener and T. Diez, *European Integration Theory*, 2nd edition (Oxford: Oxford University Press 2009), pp 91-104, p 92.

⁶² S. Hix, *op.cit.*, p 16; G. Marks, L. Hooghe and K. Blank, “European Integration from the 1980s: State-Centric v. Multi-Level Governance”, *Journal of Common Market Studies*, 1996, Vol.34, No.3, pp 341-378; P. Pierson, “The Path to European Integration: A Historical Institutionalist Approach”, *Comparative Political Studies*, 1996, Vol.29, No.2, pp 123-163; W. Sandholtz and A. Stone Sweet, “European Integration and Supranational Governance”, *Journal of European Public Policy*, 1997, Vol.4, No.3, pp 297-317; B. Kohler-Koch, “The Evolution and Transformation of European Governance”, in: B. Kohler-Koch and R. Eising (eds.), *The Transformation of Governance in the European Union* (London: Routledge 1999); M. Jachtenfuchs, “The Governance Approach to European Integration”, *Journal of Common Market Studies*, 2001, Vol. 39, No.2, pp 245-264.

on major institutional changes, but on the day to day functioning of the EU as a polity as well.⁶³ Marks introduced the term ‘multi-level governance’ to EU studies.⁶⁴ It refers to the open-ended nature of European integration with multiple actors at different levels, from the local and regional to the European level. Marks and Hooghe understand multi-level governance as ‘the dispersion of authoritative decision making across multiple territorial levels’.⁶⁵ Peterson regards the EU as a multi-tiered system of governance.⁶⁶ In his view, no single theory can explain European governance on *all* levels. ‘Macro’ approaches or ‘grand Theories’ were very helpful in explaining the historical decisions of the EU. But they are not very helpful with regards to day-to-day decision making. That is the point of adopting a governance approach.

Hix regards the EU as a political system without having to be a state.⁶⁷ He uses a functionalist framework that was developed by Almond and Easton.⁶⁸ According to this, a democratic political system consists of four elements: 1. A clearly defined set of institutions for collective decision-making and a set of rules governing relations between them, 2. Citizens and social groups represent their interests via interest groups and political parties, 3. Decisions have an impact on the distribution of economic resources and the allocation of social and political

⁶³ L. Cram, “Integration Theory and the Study of the European Policy Process”, in: J. Richardson (ed), *European Union: Power and Policy-Making* (London: Routledge 2001), pp 51-74, p 65.

⁶⁴ G. Marks, “Structural Policy in the European Community”, in: A. Sbragia (ed.), *Euro-Politics: Institutions and Policy-Making in the ‘New’ European Union* (Washington: The Brookings Institution 1991).

⁶⁵ L. Hooghe and G. Marks, *Multi-level governance and European Integration* (Boulder, CO: Rowman and Littlefield 2001), p xi.

⁶⁶ J. Peterson, “Decision-making in the European Union: Towards a Framework of Analysis”, *Journal of European Public Policy*, 1995, Vol.2, No.1, pp 69-93.

⁶⁷ S. Hix, *op.cit.*, p 2.

⁶⁸ G. Almond, “Comparing Political Systems”, *Journal of Politics*, Vol.18, No.2, pp 391-409; D. Easton, “An Approach to the Study of Political Systems”, *World Politics*, Vol.9, No.5, pp 383-400.

values across the system, and 4. There is an interaction between these political outputs. In Hix's view, the EU possesses all of them.⁶⁹ The institutional stability and complexity; a complex network of public and private groups, competing to influence the EU policy process; EU decisions are highly significant and felt throughout the EU; the political process of the EU political system is a permanent feature of political life in Europe. Unlike other international organisations, EU business is conducted in multiple settings on virtually every day of the year.⁷⁰

The explanation of day-to-day politics is a central concern of governance models. They are therefore rather concerned with the micro or medium level of integration. When it comes to the legitimation criteria, governance theories accept legitimation through more technocratic models rather than a parliamentary emphasis. In that respect, they share similarities with policy-network theories.

Theories of public policy making in the European Union ask how policies are made on the European level. Peterson and Bomberg suggest the use of policy-network analysis.⁷¹ Policy-network analysis tries to explain the decision-making process between multiple stakeholders. This school has a focus on expert knowledge and outcomes, not on politics in the ideological sense. Stakeholder actors have a main concern on the outcome of a decision-making process. In other words, policy-network analysis is not so much concerned with a constitutionalised decision-making process between institutions, but with an understanding of the

⁶⁹ S. Hix, *op.cit.*, p 3.

⁷⁰ S. Hix, *op.cit.*, p 4.

⁷¹ J. Peterson and E. Bomberg, *Decision-making in the European Union* (Basingstoke: Macmillan 1999); J. Peterson, "Keynote article: Europe, America, Iraq: worst ever, ever worsening?", *Journal of Common Market Studies*, 2004, Vol.42, No.1, pp 9-26.

relationships and interacting between multiple actors, rather than specific legitimating mechanism. Due to the large number of stakeholders such as interest lobby groups etc. located in Brussels, this school provides a useful tool for investigating the decision-making process on the European level.

Close to the assumption of policy-network analysis is the work of Majone, who applies the theory of the 'regulatory state' to the European Union and considers the European Union to be a technocratic regulatory regime.⁷² Because under this view the EU is similar to a regulatory state, concerned with the regulation of the single market instead of redistributive policies, legitimation by policy-outcomes is considered as sufficient. This school regards regulation as a general form of governance. The use of 'regulatory' EU institutions by member states shows similarities to the principal agent component of intergovernmentalism.

Under the supranational technocratic model, the European Parliament is not a central actor in providing legitimacy, but outcomes are. Neo-functionalists, envisaging an approach disconnected from policy concerns, focus on outcomes of technocratic experts. With regards to legitimation criteria, governance theories accept legitimation through more technocratic models rather than a European parliamentary emphasis. In that respect, they share similarities with policy-network theories. The regulatory state theory, concerned with the regulation of the single market instead of redistributive policies, considers legitimation by policy-

⁷² G. Majone, "The Rise of the Regulatory State in Europe" (1994), *West European Politics*, Vol. 17 No. 3, pp 77-101 at p 98; G. Majone, "Europe's 'Democratic Deficit': The Question of Standards" (1998), *European Law Journal*, Vol. 4 No. 1, pp 5-28; *Dilemmas of European Integration: the Ambiguities and the Pitfalls of Integration by Stealth* (Oxford: Oxford University Press 2005).

outcomes as sufficient. It is most explicitly dismissive of the actual and potential contribution of the European Parliament. In the following Section, I turn to those who regard the European Union as a federal model and the corresponding focus of legitimation.

2.3 The EU as a Federal Model

According to Wallace, federal analogy provides a useful way of focusing attention on a number of characteristics of the ‘Community system’⁷³.⁷⁴ After the Second World War, the idea of a federal Europe gained momentum for securing peace on the European continent. The writings of Count Coudenhove-Kalergi as well as the resistance movement formed the basis of the European federalist movement.⁷⁵ Federalists including Altiero Spinelli, Walter Hallstein and Jean Monnet led this movement in the early years of European integration.

The term federalism can have at least two meanings: it can define a goal for integration, and it can have an institutional meaning. Federalism therefore has a strong normative element as well. In the institutional sense, the two types of federal governmental structures are those of federation and confederation. In general, federal institutions combine a constitutionally enshrined form of shared rule plus self-rule. This definition of ‘self-rule plus shared rule’ by Elazar is

⁷³ Since the entry into force of the Lisbon Treaty on 1 December 2009, the EC Treaty has been amended and renamed the Treaty on the Functioning of the Union. The European Union succeeded the legal personality of the Community and the former pillar structure of the Maastricht Treaty has been demolished. When reference is made to the ‘Community system’ or ‘Community method’, this refers to the decision procedure under the former first pillar which involves the supranational elements in the EU’s institutional structure such as the European Parliament and the Commission.

⁷⁴ W. Wallace, *op.cit.*, p 406.

⁷⁵ R. N. Coudenhove-Kalergi, *Pan-Europa* (Glarus: Pan-Europa 1923); *Europe Must Unite* (Glarus: Pan-Europa 1938); *Crusade for Pan-Europe* (New York: Putnam 1943).

probably the most often used formula of federal entities.⁷⁶ According to Elazar, federal systems are based on six fundamental principles:

1. They are non-centralised
2. They are predisposed towards democracy
3. They have established a system of checks and balances
4. They operate through a process of open bargaining
5. They have a written constitution
6. And they have constitutionally determined the fixed units of power within the polity.⁷⁷

As Annett puts it, a federation has a constitution, provides for judicial review, has a federal bicameral legislature and secures the division of powers between the federal and constituent governments.⁷⁸ King defines a federation as an institutional arrangement in the form of a sovereign state, ‘distinguished from other states solely by the fact that its central government incorporates constituent territorial units into its decision-making procedure on some constitutionally entrenched basis’.⁷⁹ A confederation is more limited in scope and does not have any competences with regards to its constituents’ internal policies. Whereas a confederation deals with external affairs between nations a federation deals with internal affairs between territorially based groups.⁸⁰

⁷⁶ D. J. Elazar, *Exploring Federalism* (Tuscaloosa, Alabama: University of Alabama Press 1987), p 12.

⁷⁷ D. Elazar, “Federalism“, in S. Lipset (ed. in chief), *The Encyclopedia of Democracy* (London: Routledge 1995), pp 474-482, at p 476.

⁷⁸ I. Annett, “The Case of the EU: Implications for Federalism”, in *Regional and Federal Studies*, 2010, Vol.20, No.1, pp 107-126 at p 109.

⁷⁹ P. King, *Federalism and Federation* (London: Croom Helm 1982), p 77.

⁸⁰ M. Frenkel, *Federal Theory* (Canberra: Australian National University 1986), pp 63-68.

Federal democracy is a form of representative democracy. Federal institutions allow for the performance of representative democracy on at least two levels, an upper and a lower tier. A federal model contains the elements of self rule plus shared rule. The EU hosts intergovernmental elements as well as supranational elements which complement each other.

Burgess defines the EU as a ‘federal Europe’, but does not assume that federalism will always lead to federation.⁸¹ In his terms, the EU represents a ‘new federal model’.⁸² Schütze regards the European Union as a ‘federation of States’.⁸³ The idea of identifying the EU as a federation of states is shared by Dashwood, Börzel and Risse.⁸⁴ If one would reduce the concept of federation to that of a nation state, the EU would not fulfil these criteria due to its enumerated powers and a lack of *Kompetenz-Kompetenz*.⁸⁵ The only way of accepting the EU as a federation of states were to abandon the principle of undivided sovereignty and to accept, in the way Pescatore did, a divisibility of sovereignty.⁸⁶ As the ECJ ruled in *Costa v. ENEL*, the Member states have limited their sovereignty in certain fields and transferred powers to the then Community.⁸⁷ Annett acknowledges that the

⁸¹ M. Burgess, *Federalism and European Union: The Building of Europe, 1950-2000* (London: Routledge 2000), p 29.

⁸² M. Burgess, *Comparative Federalism: Theory and Practice* (Oxon: Routledge 2006), p 239.

⁸³ R. Schütze, “On ‘Federal’ Ground: The European Union as an (Inter)national Phenomenon”, *Common Market Law Review*, 2009, No. 46, pp 1069-1105, at p 1105.

⁸⁴ A. Dashwood, “The relationship between the Member States and the European Union/Community”, *Common Market Law Review*, 2004, Vol.41, No.4, pp 355-381, p 356; T. Börzel and T. Risse, *Who is Afraid of a European Federation?*, Symposium: Responses to Joschka Fischer, Jean Monnet working paper No.7/00.

⁸⁵ R. Schütze, *op.cit.*, p 1087.

⁸⁶ R. Schütze, *op.cit.*, p 1105; P. Pescatore, *The Law of Integration: Emergence of a new Phenomenon in International Relations, based on the Experience of the European Communities* (Leiden: Sijthoff 1974), p 30.

⁸⁷ Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585, p 593.

sovereignty of the Member States appears to be contradictory to a federal polity.⁸⁸ However, she suggests a definition of federation that accepts a partial transfer of sovereignty by Member States. The degree of sovereignty transfer should be such that it enables both a political relationship of the federation with its citizens as well as the citizen's relationship with the states.⁸⁹

Federal democracy is predisposed towards representative democracy. Federal institutions allow for the performance of representative democracy on at least two levels, an upper, federal level, and a lower level. In a European federal order, parliamentary democracy is practiced on multiple tiers: on a regional, a national and on a federal tier. From a federal perspective, the European Parliament is the central legitimating mechanism. A European electorate votes for a European Parliament, which democratically legitimates European governance. The Council, representing the interests of the component states, functions as the second chamber of a bicameral legislature.

We have identified and analysed three models of integration; each advances its own understanding of the core legitimating mechanism(s) and in that regard advances a greater or lesser role to the EP. Whereas the European Parliament has no or hardly any role to play as a means of legitimation among those who regard the European Union as an international organisation or as a supranational technocratic regime, in a federal order legitimation mechanisms require a directly elected European Parliament as their key institution. Having identified the

⁸⁸ I. Annett, "The Case of the EU: Implications for Federalism", *Regional and Federal Studies*, 2010, Vol.20, No.1, pp 107-126, p 117.

⁸⁹ I. Annett, *op.cit.*, p 121.

different sources of legitimacy under the three different models of international organisation, supranational technocratic regime and federal order, I shall investigate the matter of the existence of a democratic deficit in the European Union under each model hereinafter in the following Section.

2.4. Is There a Democratic Deficit According to the Three Models?

This Section analyses the existence of a democratic deficit in the European Union. Corresponding to the different legitimating mechanisms under my three different models of an international Organisation, a supranational technocratic model and of a federal order, the acceptance or denial of a democratic deficit in the EU depends on the democratic standard which is applied. While some scholars deny the existence of a democratic deficit in the European Union,⁹⁰ others consider this deficit to be ‘gigantic’.⁹¹ As the focus of this thesis is on the European Parliament, I shall turn to an evaluation of the existence of a democratic deficit under the international organisation model, the supranational, technocratic model and the federal model and the proposed remedies. I shall begin with points of view rendered by those who consider the EU as an international organisation, before coming to positions under the other two models.

International Organisation

In general, there can only be a deficit if there is a divergence, a minus, from the applied standard. From a ‘pure’ intergovernmentalist perspective, the 27 national electorates vote for the respective national parties. These political parties support

⁹⁰ A. Moravcsik, “In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union”, *Journal of Common Market Studies*, 2002, Vol.40, No.4, pp 603-624, p 621.

⁹¹ R. Dahl, *On Democracy* (New Haven: Yale University Press 1998), p 115.

their national governments via parliamentary groups. National governments represent their Member States in the Council and in the European Council. This constitutes the ‘intergovernmental route’ for providing democratic legitimacy.⁹² Some see a democratic deficit in the limited role of Member State legislatures in cases of qualified majority-voting in the Council.⁹³ Here, governments can decide not to take the views of national parliaments into consideration or they can be outvoted. For this school, an increase in the role of national parliaments and their rights to be informed of and to object to EU acts under Article 12 TEU and the respective Protocols is a way to address the deficit.⁹⁴

Liberal intergovernmentalism, in the form espoused by Moravcsik, on the other hand, argues that the EU does not suffer from a democratic deficit.⁹⁵ An insulation of mainly regulatory policy fields from majoritarian decision-making was in line with practice in most modern democracies. The assessment of a democratic deficit in the EU would therefore result from overdrawn criteria that most national democracies would not comply with.⁹⁶ It is also argued that European governance is too remote for citizens to understand the very nature of EU decision-making.⁹⁷ Whereas some who follow the model of the EU as an international organisation see a democratic deficit in a limited role of national parliaments, others do not see

⁹² For a graphical illustration of this route of democratic legitimation, please refer to J. Thomassen and H. Schmitt, “Political Representation and Legitimacy in the European Union”, in H. Schmitt and J. Thomassen (eds.) *Political Representation and Legitimacy in the European Union* (Oxford: Oxford University Press 1999), pp 3-24, p 18.

⁹³ T. Raunio, “Always One Step Behind? National Legislatures and the European Union”, *Government and Opposition*, (1999), Vol.34, No.2, pp 180-202, p 180.

⁹⁴ Protocol No.1 on the Role of National Parliaments in the EU and Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality.

⁹⁵ A. Moravcsik, *op.cit.*, p 621.

⁹⁶ A. Moravcsik, *ibid.*

⁹⁷ P. Magnette, “Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context”, *European Law Journal*, (2001), Vol.3, No.3, pp 192-310, p 309.

a deficit. As the focus of this thesis is on the European Parliament, I shall turn to an evaluation of the existence of a democratic deficit under the supranational, technocratic model and the federal model and the proposed remedies.

Supranational, Technocratic Model

Majone, for example, regards the EU as a ‘regulatory state’ and considers the European Union to be a technocratic regulatory regime.⁹⁸ With the regulation of the single market as its primary objective, outcomes are essential as a strategy to provide democratic legitimacy. A ‘depoliticisation of European policy-making’ was the price to pay to preserve the sovereignty of the member states.⁹⁹ For this school, there is no democratic deficit and majoritarian parliamentary politics would be contrary to achieve further integration. Ipsen already made that case in the 1970s when he described the European Community of that time as a *Zweckverband*, a special purpose association, which pursued the aim of economic integration and was due to this purely functional goal incapable of ideological debate.¹⁰⁰ Mestmäcker emphasises the economic focus of integration and the extended individual freedoms as the sources of legitimacy.¹⁰¹ Under this model, no democratic deficit, especially none to which the European Parliament is called upon as a remedy, can be discerned.

⁹⁸ G. Majone, “The Rise of the Regulatory State in Europe” (1994), *West European Politics*, Vol. 17 No. 3, pp 77-101 at p 98; G. Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards” (1998), *European Law Journal*, Vol. 4 No. 1, pp 5-28; *Dilemmas of European Integration: the Ambiguities and the Pitfalls of Integration by Stealth* (Oxford: Oxford University Press 2005).

⁹⁹ G. Majone, “Delegation of Regulatory Powers in a Mixed Polity”, (2002) *European Law Journal*, Vol.38, No.2, pp 319-339, p 338.

¹⁰⁰ H. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr (Paul Siebeck) 1972), p 198.

¹⁰¹ E. Mestmäcker, “On the Legitimacy of European Law”, (1994) *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, Vol.58, pp 615-635.

Federal Model

Under the federal model, a European electorate votes for European political parties. These parties form parliamentary groups in the European Parliament and support a European executive. This constitutes the ‘federal route’.¹⁰² Whereas some also support an increase of competences for the European Parliament to redress the democratic deficit,¹⁰³ Franklin et al. hold that ‘until elections provide mandates to govern Europe in some particular fashion, the democratic deficit will continue to fuel the crisis of legitimacy that the European Union now faces’.¹⁰⁴ According to the federal model, representative democracy and functions of parliaments must be performed on the same European level as the decision-making process. Schmitt and Thomassen argue that in this regard the European Parliament has a unique function that cannot be performed by national parliaments.¹⁰⁵ Those who regard the EU as a political system in its own right argue that it should be held to the same democratic standards that apply to a state and assess the existence of a democratic deficit.¹⁰⁶ It is held that EU law impacts directly on citizens, as producers, employees and consumers, and requires their acknowledgment of it as binding on them, and therefore their recognition of the EU as a rightful source of law.¹⁰⁷ Because decisions taken at the EU level can have a direct impact on citizens, a direct in addition to a merely indirect form of

¹⁰² For a graphical illustration of this route of democratic legitimation, please refer to J. Thomassen and H. Schmitt, *op.cit.*, p 18.

¹⁰³ J. Lodge, “The European Parliament and the Authority-Democracy Crisis“, *Annals of the American Academy of Political and Social Science*, (1994), Vol.531, pp 69-83, p 69.

¹⁰⁴ M. Franklin, C. van der Eijk and M. Marsh, “Conclusions: The Electoral Connection and the Democratic Deficit“, in C. Van der Eijk and M. Franklin, *Choosing Europe? The European Electorate and National Politics in the Face of the Union* (Ann Arbor: The University of Michigan Press 1996), p 377.

¹⁰⁵ J. Thomassen and H. Schmitt, *op.cit.*, p 256.

¹⁰⁶ M. Newman, *Democracy, Sovereignty, and the European Union* (New York: St. Martin’s Press 1996), p 173.

¹⁰⁷ D. Beetham and C. Lord, “Legitimacy and the European Union”, in A. Weale and M. Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, London 1998), 15 - 33, at p 17.

legitimacy, which acknowledges that the EU is a political system in its own right, is needed.¹⁰⁸ Under the federal model, the failure of European elections in providing a bearing on the way the EU is governed due to a lack of competition in elections results in a democratic deficit and challenges the legitimacy of the EU. Despite the European Parliament being regarded as the central legitimating mechanism for the European Union under the federal model, Parliament fails to address the democratic deficit.

To proponents of the international organisation model of the EU, the democratic deficit is either non-existent or not a matter for the European Parliament. Under the supranational, technocratic model, again, no democratic deficit can be discerned, especially none to which the European Parliament is called upon as a remedy. Despite the European Parliament being regarded as the central legitimating mechanism for the European Union under the federal model, Parliament fails to address this democratic deficit. In the following next section, I shall begin to address the question what can be done to make a difference.

3. What Kind of Democracy in Europe?

Through the lens of the federal model, the European Parliament is the central legitimating mechanism. However, under this model, the democratic deficit is not addressed by the way elections to the EP are currently conducted. Having established that under the other two models either no democratic deficit exists or the European Parliament is not considered as the remedy to address that deficit, Section 3 continues to analyse the matter of addressing the democratic deficit

¹⁰⁸ S. Hix, "The study of the European Community: the challenge of comparative politics", (1994) Vol. 17 No. 1 West European Politics pp 1-30, p 12.

through the lens of the federal model. I shall begin with analysing the very possibility of democracy on the European level, attending the no-demos thesis. Hereafter, I look for support for the federal model of democracy first in the EU's constitutional order, and then, due to its profound effect on the constitutional development of the EU, in the case law of the European Court of Justice, before turning to the matter of choosing a democratic model for the European Union. Liberal democracies have produced different institutional types, such as *majoritarian* or Westminster and *consensus* or federal democracies, for example.¹⁰⁹ I shall analyse the current model of democracy in the EU as well as present a proposal to address the democratic deficit.

3.1 Can there be a European Democracy?

Grimm¹¹⁰ and the German Federal Constitutional Court in its so called Maastricht judgement of *Brunner v The European Union Treaty*¹¹¹ have put forward a precondition for a European scale democracy. Weiler, Haltern and Mayer have named this school of thought the No-Demos Thesis.¹¹² Grimm holds that at present there would be no collective identity within the peoples which comprise the EU, judged by criteria such as a Europeanised party system, European media, European civic associations, and the like.¹¹³ The linguistic diversity and the

¹⁰⁹ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press 1977); *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984); *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990* (Oxford: Oxford University Press 1994); *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press 1999).

¹¹⁰ D. Grimm, "Does Europe need a Constitution?", *European Law Journal*, 1995, Vol.1, No.3, pp 282-302.

¹¹¹ *Brunner et al. v The European Union Treaty* [1994] 1 Common Market Law Reports 57; Cases 2 BvR 2134/92 & 2159/92, Bundesverfassungsgericht, Judgement of 12 October 1993.

¹¹² J. Weiler, U. Haltern and F. Mayer, "European Democracy and its Critique -- Five Uneasy Pieces", *Jean Monnet Working Papers*, NYU School of Law, No.1/95, p 6.

¹¹³ D. Grimm, *op.cit.*, p 295, 296.

absence of a common language would obstruct the possibility of a true European democracy. This diversity would be ‘the biggest obstacle to Europeanisation of the political substructure, on which the functioning of a democratic system and the performance of a parliament depends’.¹¹⁴

Whilst there is undoubted force in key elements of the no-demos thesis it is submitted by Habermas, for example, that the ‘ethical-political self-understanding of citizens in a democratic community’ must not be taken as a precondition for democratic will-formation, but as a result of such a process.¹¹⁵ As Hix puts it, rather than regarding the existence of a European *demos* as a prerequisite for European democracy, a European democratic identity might as well come into existence through the practice of European political competition.¹¹⁶ Hix holds that competition fosters political debate which promotes the formation of public opinion.¹¹⁷ Such a shaping of public opinion is essential for the formation of identities. Therefore, electoral contests are regarded as an important prerequisite in the formation of political identities rather than the other way round.

The very claim that a European identity does not exist is contestable. In Weiler’s terms, it is essential to understand the concept of a European *demos* ‘in non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational intellectual culture

¹¹⁴ D. Grimm, *op.cit.*, p 295.

¹¹⁵ J. Habermas, “Remarks on Dieter Grimm’s ‘Does Europe need a constitution?’”, *European Law Journal*, (1995), Vol.1, No.3, pp 303-307, p 306.

¹¹⁶ A. Follesdal and S. Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, 2006, Vol. 44 No.3 *JCMS* 533-562 at p 550.

¹¹⁷ A. Follesdal and S. Hix, *ibid.*

which transcend organic-national differences'.¹¹⁸ If one takes the success of European integration since the foundation of the ECSC and the common cultural background with the 'shared historical experience of having happily overcome nationalism',¹¹⁹ it can be argued that a European demos, albeit in a far thinner sense than a national demos, already exists.

The no-demos thesis shows a somewhat fatalistic argument: in the absence of a European demos, the democratic deficit cannot be redressed. On the other hand, many examples show that collective identities can emerge in highly diverse and plural societies, for example in the United States and Switzerland. Scharpf highlights the identity-establishing capacity of the German *Länder*: although these have been totally artificially created by allied military governments more than sixty years ago without any regard for the diverse regional identities and cultural backgrounds, identification with the respective states is so strong that every attempt to change territorial boundaries has failed so far.¹²⁰

National identities in Europe were formed as a result of a process of democratic will-formation. It is in that respect that elections to the European Parliament can have a decisive inducing effect. A political process in the EU can result in a stronger common identity. The no-demos thesis does not present a convincing argument against the feasibility of redressing the democratic deficit. From the position of proponents of a federal model, a European democracy is possible. In

¹¹⁸ J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", *European Law Journal*, (1995), pp 219-258, pp 243, 244.

¹¹⁹ J. Habermas, *op.cit.*, p 307.

¹²⁰ F. Scharpf, "Economic integration, democracy and the welfare state", *Journal of European Public Policy*, (1997), Vol.4, No.1, pp 18-36, p 20.

the next paragraph, I shall explore the democratic elements of the Union's constitutional order to see to what extent democracy finds expression there.

3.2 Democracy and the EU's Constitutional Order

To what extent does the constitutional order support democracy as envisaged by proponents of the federal model? To begin with, I shall investigate the constitutional basis of the EU treaties before I turn to the case law of the European Court of Justice.

Democracy as a constitutional principle has found its way into the Union's primary law in the last two decades.¹²¹ The democratic principle finds its expression in the role of elections and provides legitimacy in a twofold way: through direct elections to the European Parliament and in an indirect way through the Council and national parliaments.¹²² Although participatory elements in the form of the European Citizen's initiative have now found their way into the Union's primary law through the Lisbon reforms, they are of a rather supplementary nature. The focus remains on representative democracy. I shall deal with the innovations of the Lisbon Treaty in greater detail below, but will start to investigate the democratic principle in a more chronological manner.

¹²¹ B. Kohler-Koch and B. Rittberger, "Debating the Democratic Legitimacy of the European Union", in B. Kohler-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Plymouth: Rowman & Littlefield Publishers 2007), p 19.

¹²² B. Kohler-Koch and B. Rittberger, *ibid.*

Treaties etc.

The implementation of democracy as a legal principle into the European Union's primary law has been a cumbersome process. As von Bogdandy¹²³ rightly observes, the very notion of democracy did not make it into the act of 20 September 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage.¹²⁴

The Treaty of Maastricht brought up democracy with regards to the European institutional framework in its preamble.¹²⁵ Article F 1. of the TEU Maastricht mentioned democracy with regards to the Member States' systems of government, not to the EU's institutions themselves. The Treaty of Amsterdam¹²⁶ amended Article 6 TEU to the effect that it stated that the Union is founded on the principle of democracy. The Nice Treaty maintained this.¹²⁷ The democratic principle was also acknowledged outside of the EU's treaty structure. For example, in its judgement of *Matthews v. United Kingdom* the European Court of Human Rights determined that the European Parliament has to be considered as a legislature in the sense of Article 3 Protocol No.1 to the ECHR.¹²⁸ Therefore, Gibraltar habitants cannot be deprived of their democratic right to participate in elections to the European Parliament. That way, the European Court of Human Rights acknowledged the importance of elections to the EP and of the free expression of

¹²³ A. Von Bogdandy, "Remarks on European Democracy as a Legal Principle", in B. Kohler-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Plymouth: Rowman & Littlefield Publishers 2007), pp 33-44, p 34.

¹²⁴ Act concerning the election of the representatives of the Parliament by direct universal suffrage, OJ L 278, 8.10.1976, p 1.

¹²⁵ OJ C 191/01, 1992, Treaty on European Union.

¹²⁶ OJ C 340, 1997, Treaty of Amsterdam amending the Treaty on European Union, The Treaties establishing the European Communities and Related Acts.

¹²⁷ OJ C 80/1 Treaty of Nice amending the Treaty on European Union, The Treaties establishing the European Communities and Related Acts.

¹²⁸ ECHR, *Matthews v. United Kingdom*, Rep 1999-I, p 251.

voters. The right to vote in European elections constitutes a fundamental right that citizens cannot be deprived of. The European Parliament is considered as a full legislature and not just an auxiliary institution of the European legislative process.¹²⁹

From within Member States, examples could be drawn, for example, from the German Basic Law. Article 23 Section 1 of the *Grundgesetz für die Bundesrepublik Deutschland* states that ‘With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to *democratic*, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.’¹³⁰ The openness of the *Grundgesetz* towards European integration finds its expression in this article. In particular, there is a clear link to the values of democracy and federalism in European integration.

The democratic principle has found its way into the constitutional framework in the Maastricht Treaty and has been confirmed in subsequent Treaty amendments. Outside the EU framework, examples for the acknowledgment of the importance of the EP as a legislature can be found in the European Court of Human Rights judgement in *Matthews*. Coming back to more recent progress in the

¹²⁹ J. Bröhmer, “Das Europäische Parlament: Echtes Legislativorgan oder bloßes Hilfsorgan im legislative Prozeß? Zur Matthews-Entscheidung des Europäischen Gerichtshof für Menschenrechte.“, *Zeitschrift für Europarechtliche Studien*, (1999), Vol.2, No.2, pp 197-217.

¹³⁰ Article 23, Section 1, *Basic Law for the Federal Republic of Germany*, emphasis added by the author.

constitutional developments of the EU, I shall turn to discuss the democratic innovations of the Lisbon Treaty.

In the constitutional Convention that met from February 2002 to July 2003,¹³¹ it was not only MEPs, but also MPs from integrationist friendly parties who argued for more powers for the European Parliament, aware of limitations of national parliaments to influence the EU's policy agenda.¹³² Changes in the EP's catalogue of competences first contained in the failed Treaty establishing a Constitution for Europe have been transferred to the Lisbon Treaty. The consolidated version of the TEU contains the following democratic principles: the republican principle of democratic equality of its citizens,¹³³ the principle of representative democracy with citizens represented directly in the European Parliament and Member States represented in the Council¹³⁴ and explicitly the role of European political parties in contributing to the formation of 'European political awareness and to expressing the will of citizens of the Union'.¹³⁵ Moreover, the elements of participation and transparency are affirmed.¹³⁶

The TEU mentions, among others, the 'universal values' of democracy and equality in its Preamble as well as in Articles 2 and 21.¹³⁷ Those values are also contained in the Preamble of the Charter of Fundamental Rights of the European

¹³¹ URL <http://european-convention.eu.int/enjeux.asp?lang=EN>, on web 6 August 2010.

¹³² A. Duff, *Saving the European Union: The Logic of the Lisbon Treaty* (London: Shoehorn 2009), p 22.

¹³³ OJ C 115, Consolidated Version of the Treaty on European Union, Article 9.

¹³⁴ Article 10 (1), (2).

¹³⁵ Article 10 (4).

¹³⁶ Article 10 (3).

¹³⁷ OJ C 115/15, Consolidated Version of the Treaty on European Union, Preamble, p 3.

Union.¹³⁸ Article 10 (1) TEU emphasises that the ‘functioning of the Union shall be founded on representative democracy’, with citizens ‘directly represented at Union level in the European Parliament’ and member states represented in the European Council and the Council, Art. 10 (2) TEU. A highly interesting innovation can be found in Art. 14 (2) TEU: ‘the European Parliament shall be composed of representatives of the Union’s citizens’ and no longer of ‘representatives of the peoples of the states’.¹³⁹

Arts. 10 (3) and 11 (4) further state the EU’s commitment to participatory democracy. A novelty to the TEU has been introduced in the field of participatory democracy with a plebiscitary element. The TEU grants the right to not less than one million citizens from a ‘significant number of Member States’ to submit an ‘appropriate proposal’ legal act to the Commission.¹⁴⁰ With a European citizenry of a little over 500 million people, the TEU introduces an attainable quorum. The popular initiative, however politically substantial it may be, is not legally binding though.

The TEU assigns European political parties the role of contributing to ‘forming political awareness and to expressing the will of citizens of the Union’ in Article 10 (4). The TEU thereby allocates European political parties a decisive role, also in European elections. In addition to this ‘European’ level, the TEU stipulates subsidiarity on the other side of the macro-micro level spectrum. Decisions shall be taken ‘as closely as possible to the citizen’, Article 10 (3) TEU and Arts. 5, 12 TEU.

¹³⁸ OJ C 364/1, Charter of Fundamental Rights of the European Union, Preamble, p 8.

¹³⁹ OJ C 321, Article 189.

¹⁴⁰ Article 11 (4).

Taken together, a confession of the Treaty on European Union to representative government can be established. Through the lens of the federal model, democracy via the EP manifests itself in the TEU Lisbon in a manifold way: in the republican principle of the democratic equality of EU citizens, in the confession of representative democracy with citizens represented directly in the European Parliament and Member States represented in the Council, in the important role of European political parties and in an innovation which is far more than just a minor linguistic change: Members of the European Parliament are representatives of the Union's citizens. Although the role of national parliaments finds further mention and elements of direct democracy have been introduced, there is support for European representative democracy in the Lisbon Treaty. I shall now turn to the case law on the matter of democracy of the European Court of Justice, as well as of the German Federal Constitutional Court, to provide an example of a member state based court.

Case Law

The European Court of Justice started to introduce democracy as a legal principle from the 1980s onwards.¹⁴¹ In *Roquette Frères v. Council* the ECJ held that the participation of the European Parliament in the then consultation procedure reflects the 'fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly' at Community level.¹⁴² In this case, the applicant submitted that Council adopted a

¹⁴¹ Case 138/79, *Roquette Frères v. Council* [1980] ECR 3333, para 33; Case C-300/89, *Commission v. Council* [1991] ECR I-2867, para 20; Case C-65/93, *Parliament v. Council* [1995] ECR I-643, para 21; Case C-21/94, *Parliament v. Council* [1995] ECR I-1827, para 17; Case C-392/95, *Parliament v. Council* [1997] ECR I-3213, para 14; Case T-135/96, *UEAPME v. Council* [1998] ECR II-2335, para 89.

¹⁴² Case 138/79, *Roquette Frères v. Council* [1980] ECR 3333, para 33.

regulation without having received the EP's opinion. This declaration of a fundamental democratic principle was further repeated in the second Isoglucose judgment of *Maizena v Council*¹⁴³ and in *Commission v. Council*.¹⁴⁴ The European Court carried this forward by naming Parliament's participation an 'essential factor in the institutional balance'.¹⁴⁵ In *UEAPME v. Council* the ECJ refers to the 'principle of democracy on which the Union is founded' and demands that in the 'absence of the participation of the European Parliament in the legislative process' participation of the people is assured otherwise.¹⁴⁶ This brief outline demonstrates how the European Court has introduced democracy as a fundamental principle. The ECJ regards the European Parliament as a representative European assembly and an essential factor in the institutional structure. The Court's evaluation conforms to the federal model of providing democratic legitimacy. However, illustrations of nation state centred views can be found, for example, in the case law of the *Bundesverfassungsgericht*.

The German Federal Constitutional Court acknowledges the principle of dual legitimacy and regards the European Parliament as a source of 'supplementary democratic support' for the policies of the European Union. However, in the view of the *Bundesverfassungsgericht*, national peoples are the primary source of democratic legitimacy.¹⁴⁷ Member States had remained the masters of the treaties

¹⁴³ Case 139/79 *Maizena v Council* [1980] ECR 3393, para 34; Case C-21/94, *Parliament v. Council* [1995] ECR I-1827, para 17; Case C-392/95, *Parliament v. Council* [1997] ECR I-3213, para 14.

¹⁴⁴ Case C-300/89, *Commission v. Council* [1991] ECR I-2867, para 20.

¹⁴⁵ Case C-65/93, *Parliament v. Council* [1995] ECR I-643, para 21.

¹⁴⁶ Case T-135/96, *UEAPME v. Council* [1998] ECR II-2335, para 89.

¹⁴⁷ BVerfGE 89, *Brunner et.al. v. The European Union Treaty (Maastricht decision)* [1993], 155, translated in 1 *Common Market Law Review* 1994, Vol., p 57, p 86.

and each of them had preserved the quality of a sovereign state in its own right.¹⁴⁸ In its Lisbon judgement, the Federal Constitutional Court maintains that the citizens of the Member States remained the subject of democratic legitimation.¹⁴⁹ To the *Bundesverfassungsgericht*, the European Parliament cannot perform as a representative body of a sovereign people because the principle of electoral equality is not respected.¹⁵⁰ The EP remained a representation of peoples of the respective member states, not a representation of Union citizens.¹⁵¹ Whereas the European Court acknowledges the EP's role as an 'essential factor', Germany's supreme court remains far more sceptical, assigning Parliament a rather 'supplementary' role. The *Bundesverfassungsgericht* considers national peoples as the primary source of democratic legitimacy. Although TEU Lisbon introduced the principle of equality, this is not respected in elections to the EP. The Court therefore regards the EP as a representation of the peoples of the respective member states, not as a representation of Union citizens, despite the Treaty change into this very direction introduced by Lisbon. The position of the Federal Constitutional Court brings home the differing perceptions on legitimating mechanisms in the integration process and considers the Member States as the primary source of legitimacy.

Support for the federal route of democracy can be found in several parts of the EU's constitutional order. The EU Treaty acknowledges the democratic principle

¹⁴⁸ BVerfGE 89, *Common Market Law Review* 1994, p 91.

¹⁴⁹ BVerfGE 2 BvE 2/08 [2009].

¹⁵⁰ BVerfGE 2 BvE 2/08 [2009], at para 279 the *BVerfG* refers to the democratic basic rule of equal opportunities of success of the vote. The quote 'one man, one vote', used by the Court at para 279, refers back to a campaign slogan for universal suffrage around the world in the twentieth century and should be understood in the sense of 'one person, one vote'. It does not contain any gender bias. However, it can be easily misunderstood that way.

¹⁵¹ BVerfGE 2 BvE 2/08 [2009], para 280.

in general, but also contains federal elements in a manifold way, such as the republican principle of the democratic equality of EU citizens, the confession of representative democracy with citizens represented directly in the European Parliament and Member States represented in the Council, the important role of European political parties and the innovation that MEPs, since TEU Lisbon, represent the Union's citizens. There is a federal impetus that has been introduced to democracy by the Lisbon amendments. The ECJ's evaluation conforms to the federal stream of providing democratic legitimacy in many aspects. Illustrations of nation state centred views can be found, for example, in the case law of the *Bundesverfassungsgericht*.

The identity-establishing effect of European elections may offer a way to redress the democratic deficit which exists in the views of those who conceive the European Union as a federal order. The foundations for this federal type democracy are part of the EU's constitutional order in the form of European political parties, the EP as a legislature of EU citizens and the principle of equality. Although the legitimating function of representative democracy and of the European Parliament in particular has been acknowledged in the EU's constitutional order, Treaties and case law remain silent on further details of the democratic model. I shall therefore, in the next subsection, deploy the majoritarian and the consensus models of democracy and compare the EU to it to examine the nature of democracy in Europe and address the democratic deficit. How to reconcile parliamentary democracy on the European level with the federal model?

3.3 The EU as an Extreme Case of Consensus Democracy

Liberal democracies have produced different institutional types, such as *majoritarian* or Westminster and *consensus* or federal democracies, for example.¹⁵² Majoritarian and consensual models are widely applied to democratic systems.¹⁵³ Lijphart's approach represents one of the most comprehensive and systematic comparisons of democratic models. He points out ten characteristic differences between majoritarian and consensus democracies. The first five criteria, named the *executive-party dimension*, refer to the arrangement of executive power, the electoral and party systems, and interest groups; the remaining five, named *the federal-unitary dimension*, contrast federalism and unitary government.¹⁵⁴ With the majoritarian characteristic listed first in each case, the ten differences between the majoritarian and the consensus models are:

1. 'Concentration of executive power in single-party majority cabinets versus executive power-sharing in broad multiparty coalitions;
2. Executive-legislative relationships in which the executive is dominant versus executive-legislative balance of power;

¹⁵² A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press 1977); *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984); *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990* (Oxford: Oxford University Press 1994); *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press 1999).

¹⁵³ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press 1977); *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984); *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990* (Oxford: Oxford University Press 1994); *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press 1999); L. Le Duc, R. Niemi and P. Norris, *Comparing Democracies: Elections and Voting in Global Perspective* (Thousand Oaks: Sage Publications 1996); J. Blondel, R. Sinnott and P. Svensson, *People and Parliament in the European Union* (Oxford: Clarendon Press 1998); G. Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press 2002); S. Hix, *What's Wrong with the European Union & How to Fix It* (Cambridge: Polity Press 2008).

¹⁵⁴ Lijphart, *op.cit.* (1999), p 3.

3. Two-party versus multiparty systems;
4. Majoritarian and disproportional electoral systems versus proportional representation;
5. Pluralist interest group systems with free-for-all competition among groups versus coordinated and “corporatist” interest group systems aimed at compromise and concertation;
6. Unitary and centralised government versus federal and decentralised government;
7. Concentration of legislative power in a unicameral legislature versus division of legislative power between two equally strong but differently constituted houses;
8. Flexible constitutions that can be amended by simple majorities versus rigid constitutions that can be changed only by extraordinary majorities;
9. Systems in which legislatures have the final word on the constitutionality by supreme or constitutional courts;
10. Central banks dependent on the executive versus independent central banks.¹⁵⁵

When applying Lijphart’s criteria to the European Union, the EU turns out with a strong tendency towards a consensus democracy without any majoritarian elements. The Commission with its 27 Commissioners, each coming from one of the component Member States, represents a broad multiparty and multinational coalition government. The interaction of the Commission and the European Parliament mirrors the executive-legislative balance of power. At the beginning of

¹⁵⁵ Lijphart, *op.cit.* (1999), p 3.

each five year term, the body of the Commission is subject to a vote of consent by the European Parliament.¹⁵⁶ The Commission does not even come close to a single-party majority cabinet, but represents the consensual approach of a multi-party coalition. MEPs sit in Parliament in currently seven transnational parliamentary groups along party lines.¹⁵⁷ This conforms to multiparty systems of consensus democracies. The next criterion in Lijphart's list of characteristics of democracies is the electoral system. Although European citizens have elected the European Parliament directly since 1979, there is still no uniform electoral procedure. As member states have been allowed to retain different national system until a common system can be derived, the overall result is distorted. Especially the overrepresentation of the electorates of smaller member states and the underrepresentation of the larger states contributes to a further distortion of proportionality. Still, the 27 electoral systems in use are proportional systems on a national scale. Under the model of a federal order, the European Union conforms to the criterion of federal and decentralised governance of the consensus model. The ordinary legislative procedure further underlines the strong bicameralism of the two houses of parliament:¹⁵⁸ the working parliament of the European Parliament and the Council. The constitutional rigidity of the consensus model can be exemplified by the treaties in the form of the TEU and the TFEU. Because they represent international treaties, amendments are only possible by consent. The ECJ has the right of judicial review. And the European Central Bank represents an institution which is independent from the executive.

¹⁵⁶ OJ C 115, Consolidated Version of the Treaty on European Union, Article 17, Section 7.

¹⁵⁷ URL <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=4&language=EN>, on web 6 August 2010.

¹⁵⁸ OJ C 115, Consolidated Version of the Treaty on European Union, Article 294.

The EU is a pluralistic society with national differences, of which language is an important one. It does not come as a surprise that the institutional structure of the EU matches the elements of the consensus model to such a high degree. Lijphart himself regards the EU to come remarkably close to the consensus model.¹⁵⁹ Blondel et al. make the point that different states range differently along the lines of characteristics established by Lijphart.¹⁶⁰ For example, whereas the UK with a concentration of power can be regarded as a majoritarian model, so too can the USA, but with a substantial federal element along with a separation of power. The Netherlands and Switzerland both present examples of consensus democracies, albeit Switzerland with a higher degree of dispersed powers than the Netherlands.¹⁶¹ Hardly any democracy represents a pure form of one of the two models. I regard 'majoritarian' and 'consensus' models as two ends of a continuum rather than a strict dichotomy. However, the European Union, in its current state, represents not a 'pure', but an extreme case of a consensus democracy.

So far I have established that, from the point of view of the European Union as a federal model, there is a democratic deficit in the Union. Despite the European Parliament is regarded as a central legitimating mechanism, the electoral process fails to come up to expectations under the federal model. Electoral competition is considered an essential component for the formation of a European identity. Proponents of the federal model regard a European democracy as possible, and support can be found in the constitutional order which provides the foundations

¹⁵⁹ Lijphart, *op.cit.* (1999), p 34.

¹⁶⁰ J. Blondel, R. Sinnott and P. Svensson, *People and Parliament in the European Union* (Oxford: Clarendon Press 1998), p 251.

¹⁶¹ J. Blondel, R. Sinnott and P. Svensson, *ibid.*

for this federal route democracy. However, in its current state, the European Union represents a consensus democracy, lacking a competitive element in the form of European electoral competition to provide legitimacy.

From the federal perspective, there exists a democratic deficit in the EU. One of the origins of the democratic deficit is the European Parliament's 'failure to even begin to penetrate the consciousness of so many of its electors.'¹⁶² 'If EU citizens continue to have every reason to doubt that they are offered real and meaningful choices with regard to European affairs, parliamentarisation is doomed to fail'.¹⁶³ So far, European citizens have not been offered a choice on substantive European issues in elections to the EP.

Due to a shared interest of national elites in European integration, European integration has proceeded on a 'permissive consensus' of European citizens.¹⁶⁴ In Hix's terms, this permissive consensus has collapsed and has been replaced by new transnational socioeconomic and value-based divisions. Citizens of the same social class have the same attitudes towards the EU in common and people from a similar educational background or the same generation share similar attitudes towards European integration.¹⁶⁵ Hix finds the same pattern with regards to political attitudes of European citizens: the left-right dimension is decisive, and not nationality.¹⁶⁶ Franklin, van der Eijk and Marsh agree and find that national boundaries do not have a particular significance in dividing up a single European

¹⁶² J. Blondel, R. Sinnott and P. Svensson, *People and Parliament in the European Union* (Oxford: Clarendon Press 1998), p 242.

¹⁶³ R. Andeweg, *op.cit.*, p 109.

¹⁶⁴ S. Hix, *The Political System of the European Union* (Houndmills: Palgrave Macmillan, 2nd edition 2005), p 173.

¹⁶⁵ S. Hix, *op.cit.2005*, pp 173, 174.

¹⁶⁶ S. Hix, *op.cit.2005*, p 174.

electorate: although Europeans speak many languages, they, in ideological terms, evidently use the same forms of discourse when talking about politics.¹⁶⁷ These findings reveal that conditions are met among Member States of the European Union for a transnational electoral contest. From the view of the EU as a federal order, a continuation of consensus politics by elites would aggravate public opposition to European integration. A possible way out would be a competition on European political issues among European political parties just as among parties in the national political arena in electoral contests. Political will formation is considered a precondition for a stronger European identity. European election campaigns can have an inducing effect on fostering legitimation of the European Union.

As Andeweg points out, parliamentarisation is considered as a remedy to the democratic deficit because parliaments provide a link between civil society and the executive.¹⁶⁸ Parliaments can provide a linkage in two ways: they can connect to their citizens and they can connect to the executive. By the combination of those two connections parliaments have the capability to provide democratic legitimacy. As Andeweg puts it, ‘the content of political representation in the EU seems disconnected from the content of executive-legislative relations in the EU, depriving European citizens from a meaningful influence over European policy’.¹⁶⁹ Followers of the federal model consider competition as a remedy for the democratic deficit: a politicisation of EU law-making through the realisation of constitutional principles such as the equality of the vote and the role of

¹⁶⁷ M. Franklin, C. Van der Eijk and M. Marsh, “The Electoral Connection and the Democratic Deficit”, in C. Van der Eijk and M. Franklin, *Choosing Europe? The European Electorate and National Politics in the Face of the Union* (Ann Arbor: The University of Michigan Press 1996), pp 366, 367.

¹⁶⁸ R. Andeweg, *op.cit.*, p 104.

¹⁶⁹ R. Andeweg, *op.cit.*, p 105.

European political parties in the process of will-formation of voters to enable the EP to establish a link with its electorate.

Competition over policies and political personnel takes place under the competitive democratic government model.¹⁷⁰ Schumpeter regarded democracy as a battle between political elites for control of political authority.¹⁷¹ For Schattschneider, the objective of actors in a democracy is to ‘define the alternatives of public policies in such a way that the public can participate in the decision-making process’.¹⁷² As Schattschneider remarked, ‘democracy is unthinkable save in terms of political parties’.¹⁷³ The competition between political parties constitutes the reason for their unique importance in a democratic system.¹⁷⁴ Political Parties are the labelled groups which compete for the right to govern.¹⁷⁵ The former President of the European Commission Hallstein expected the emergence of truly European political parties through European elections.¹⁷⁶ Highly coherent political groups exist in the European Parliament. But the emergence of a European political party system which is recognisable to voters has not happened so far. Parliaments without strong political parties have suffered from ‘instability, inefficiency and decision-making paralysis’.¹⁷⁷

¹⁷⁰ S. Hix, *op.cit.2005*, p 176.

¹⁷¹ J. Schumpeter, *Capitalism, Socialism and Democracy* (London: Allen and Unwin 1943).

¹⁷² E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York, NY: Holt, Rinehart and Winston 1960), p 141.

¹⁷³ E. Schattschneider, *Party Government* (New York, NY: Rinehart 1942), p 1.

¹⁷⁴ D. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press 1967), p 47.

¹⁷⁵ L. Epstein, “Political Parties in Western Democratic Systems”, in E. Buehrig (ed.), *Essays in Political Science* (Bloomington: Indiana University Press 1966), p 104.

¹⁷⁶ W. Hallstein, *Europe in the Making* (London: Allen and Unwin 1972), p 74.

¹⁷⁷ S. Hix, A. Noury and G. Roland, *Democratic Politics in the European Parliament* (Cambridge: Cambridge University Press 2007), p 49.

To engage European political parties in a competition in elections to the EP, Hix suggests that winners of elections should be entitled to win committee chairs and rapporteurships on a winner-takes-all basis instead of the current ‘horse-trading’. He further advances a similar link between election results and the composition of the Commission.¹⁷⁸ With regards to parliamentary posts, this system is to some extent already in operation in the European Parliament. After the 2009 EP elections, committee chairs were allocated on a broadly proportional basis. However, it is not only the number of chairs a parliamentary group gains that is of importance, but the ‘quality’ of that committee post is of primary importance. Whereas the budget or the constitutional affairs committee are an object of desire for parliamentary groups, others such as transport and tourism or culture and education are considered less pivotal. Another suggestion is to elect the President of the European Parliament for a five-year term instead of a two-and-a-half-year term to avoid bargaining between the EPP and S&D parliamentary groups in the European Parliament over that post. Such a proposal can be helpful to foster competition inside Parliament. But a five-year term for the EP’s president would not increase a link with the electorate and raise awareness on European issues. What is missing is a competition on substantive issues. Another proposal is the declaration of candidates for Commission President by the European party federations.¹⁷⁹ Therefore, strong and coherent European parties are needed to propose a candidate, because otherwise a choice would not be accepted within these parties. At current they are hardly more than conference organisers. But to

¹⁷⁸ S. Hix, *op.cit.2005*, p 203.

¹⁷⁹ S. Hix, *What’s Wrong with the European Union & How to Fix It* (Cambridge: Polity Press 2008), p 161.

get there, an electoral system that strengthens political competition among European political parties is needed. This is the proposal I intend to make.

Conclusion

Europe's legislature can be named a parliament, conforming to the catalogue of functions applied to national parliaments. By style, it is closer to the ideal of a working parliament than to that of a debating parliament. Whereas the European Parliament has no or hardly any role to play as a means of legitimation among those who regard the European Union as an international organisation or as a supranational technocratic regime, legitimation under a federal model requires a directly elected European Parliament as its key institution. Despite the European Parliament being regarded as the central legitimating mechanism for the European Union under the federal model, Parliament fails to address this democratic deficit due to the way elections to the EP are currently conducted. Proponents of a federal model decline the no-demos thesis and consider a European democracy possible. The constitutional order supports democracy as envisaged by proponents of the federal model in manifold ways. Currently, the Union represents a consensus democracy, lacking a competitive element in the form of European electoral competition to provide legitimacy. According to the federal model, what is missing to address the democratic deficit is an effective link between Parliament and EU citizens. To enable this link, the implementation of a competitive element in the consensus democracy of the EU is needed, thereby bringing the EU further away from an extreme consensual model and one step closer to the majoritarian end of the continuum. Conceptually I intend to achieve this remedy to the democratic deficit of the EU by connecting the democratic

model of a consensus democracy with a competitive element to the matter of electoral system reform. An electoral reform is supposed to pave the way for a European political party-based democracy. If the European Parliament manages to establish an electoral connection to its citizenry, it can be the main arena of democracy in the EU as conceived under a federal model.

I shall identify and start to address the issues at stake in the design of an appropriate electoral system for (a federal model of) the EU in Chapter Two of this thesis.

CHAPTER TWO

**THE IMPLICATIONS OF THE POLITICAL SCIENCE
OF ELECTORAL SYSTEMS FOR THE EUROPEAN
PARLIAMENT: POSITIVE ANALYSIS AND
NORMATIVE PROPOSALS**

Introduction

Having reviewed and analysed the main models used to characterise the European Union in the social science literature, we have seen that only one – the federal model – positively endorses the role of EU-level democracy. To the extent that the other models – which treat the EU as an international organisation or a form of technocratic governance – address the issue of democracy, they focus on the state level, treating EU level democracy as either irrelevant or even counterproductive. These various models are widely used in the legal literature on the European Union and also by analysts from other disciplines. This chapter deepens the interdisciplinary element of this thesis, while focusing down more sharply on the federal model. While a good deal of legal analysis is either explicitly based on a federal model of the European Union or implicitly premised on such an approach, detailed analysis of the implications of federalism for EU level democracy is much less common. Indeed, arguably the particular requirements and characteristics of an effective democratic system for the EU level have not yet been clearly identified as a subject worthy of sustained legal analysis. There is certainly relatively little legal literature on this topic.

In order to identify and start to address the issues at stake in the design of an appropriate electoral system for (a federal model of) the EU, I will, therefore draw on other social sciences and in particular on political science. As one might expect, there is a venerable, vibrant and extensive political science literature on democratic legitimacy. While some of this literature has a normative and philosophical quality, much of it is technical in character. In particular, a large literature addresses in detail the particular forms that electoral systems and law can take within democratic systems. It is worth stressing that it is generally agreed

that the choice of electoral system has major consequences for the form and character of a democracy – in terms of the patterns of representation and dynamics of legitimacy it would generate. Indeed, the particular form taken by an electoral system helps to shape the possibilities for patterns of coalition formation and even for the policy models that may develop within a polity. While the political scientists who specialise in this area are well aware of the political implications of electoral systems, we shall see that they show a striking reluctance to recommend a particular system.

This chapter, then, makes two significant contributions to the development of the thesis. First, it demonstrates the crucial role that electoral systems play shaping the democratic form and character of a political system. It does so in three major sections. The first addresses electoral systems and their consequences. It reviews the three main forms of electoral system: Plurality/Majority, or ‘first-past-the-post’, systems; Proportional Representation systems; and Combined or mixed systems, for example Two-Tier Districting and Mixed-Member Proportional systems. It goes on to assess the impact of electoral systems on voting behaviour and on representation before summarizing their role in the generation of democratic legitimacy. The second major section of the chapter turns more explicitly to the normative questions that attach to the choice of electoral system. While empirically-oriented political scientists are typically more reluctant than legal scholars to be drawn into normative debates, they have not been able to exclude such value-laden questions from the literature at least to the extent that they recognise that the choice of an electoral system will be contingent on the particular vision of democracy preferred by an actor or group or chosen for a

political system. Here, the objective is to bring normative questions out more explicitly, so Section 2 builds on the normative fragments in the relevant political science literature to consider whether it is possible to design an ideal electoral system. As we shall see, it can be argued that if agreement can be achieved on a preferred model of political system, then the question of which electoral system suits it best is begged. The final major section of this chapter then draws out the implications of the earlier analysis for the conception of an ideal type electoral system for (a federal model of) the European Union.

Beyond the substance of the analysis developed here, this chapter provides a contribution of a second sort to this thesis – it offers legal scholars a novel interdisciplinary account of the significance of electoral systems to the democratic legitimacy of the European Union. In addition, while not a major objective of the thesis, the chapter may also help to identify the normative implications for democracy of electoral technicalities more clearly than is characteristic of the political science literature, which tends to have explanatory rather than normative aspirations. Be that as it may, by drawing systematically upon the political science literature, this thesis joins a well established tradition of legal scholars using political science to expand and deepen our understanding of the EU, but does so in the novel, and particularly technical, field of electoral systems and laws. Finally, this interdisciplinary work sets the stage for the empirical analysis of the history of electoral reform and debates around electoral reform in the EU that follows in the next two chapters.

1. Electoral Systems and their Consequences

This Section focuses on the key concepts of electoral law and outlines the groups of electoral systems and their political consequences. The analysis shall provide the fundamentals for both constructing the ideal type as well as evaluating the current systems in use for elections to the European Parliament in Chapter Three. Scholars have named electoral systems ‘the cogs that keep the wheels of democracy properly functioning’¹⁸⁰ and ‘the most manipulative instrument of politics’.¹⁸¹ Yet before I come to the importance of electoral systems, it is necessary to define the concept of an electoral system: effectively it means translating votes into seats. When a parliament or any other multimember assembly is elected, the electoral system converts the votes cast into seats. In other words, the electoral system comprises the set of electoral laws that determines the composition of parliament.¹⁸² Electoral regulations, on the other hand, refer to the set of rules governing the process of elections: the calling of the election, the procedure for candidate nomination, the qualifications for citizenship, the right to vote, provisions for postal vote, procedures for scrutiny and announcement of the election results, provisions for compulsory voting, boundary delimitation (the process by which a territory is divided into constituencies), and regulations governing campaign finance and election broadcasting.¹⁸³

¹⁸⁰ D. Farrell, *Electoral Systems: A Comparative Introduction* (Houndmills: Palgrave 2001), p 2.

¹⁸¹ G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York: New York University Press, 1994), Preface p ix.

¹⁸² M. Gallagher and P. Mitchell, “Introduction to Electoral Systems”, in M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems* (Oxford: Oxford University Press 2005), pp 3-23, at p 3.

¹⁸³ P. Norris, *Electoral Engineering: Voting Rules and Political Behavior* (Cambridge: Cambridge University Press 2004), p 39.

This thesis is mainly concerned with the electoral systems used in European Parliament elections. Electoral systems are important. As Farrell puts it, electoral systems define how the political system will function.¹⁸⁴ The electoral system plays a key role in the areas of representation, political parties and party systems, government formation and coalitions.¹⁸⁵ Ensuring the legitimacy of a given political system, considered as deficient under the federal model, can be regarded as the primary function of electoral systems. Still, electoral systems are designed to fulfil a number of often conflicting functions: reflecting the wishes of voters, electing qualified representatives, producing stable governments etc.¹⁸⁶ Depending on the emphasis electoral engineers put on certain aspects of the electoral system, the electoral system will differ from that of another country. Therefore, no two countries have exactly the same electoral system. According to Harrop and Miller, an investigation of a nation's electoral system and electoral behaviour reveals how open society is to new people and new ideas and how far it is willing to tolerate disagreement and dissent.¹⁸⁷ Therefore, electoral systems are politically interesting. They matter, because they define the rules of the game. The seminal works by Douglas Rae¹⁸⁸ and Maurice Duverger¹⁸⁹ have largely dominated the study of electoral systems and their political consequences. During the last twenty years, his studies have come under closer scrutiny by scholars such

¹⁸⁴ D. Farrell, *op.cit.*, p 2.

¹⁸⁵ D. Farrell, *op.cit.*, p 3.

¹⁸⁶ D. Farrell, *op.cit.*, p 3.

¹⁸⁷ M. Harrop and W. Miller, *Elections and Voters: A Comparative Introduction* (Houndmills: MacMillan, 1987), pp 9, 10.

¹⁸⁸ D. W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press 1967).

¹⁸⁹ M. Duverger, *Political Parties, Their Organization and Activity in the Modern State* (New York: Wiley 1954).

as Riker, Cox, Gallagher, Katz, Lijphart, Norris, Shugart and Taagepera.¹⁹⁰ In addition to the large number of works on the relationship between electoral systems, proportionality and the number of political parties in a party system, the rise of specialised journals as, for example, *Electoral Studies and Representation*, has led commentators to speak of a mature field of study.¹⁹¹ For understanding the consequences of an electoral system, it is necessary to have an understanding of the various forms of electoral systems that exist.¹⁹² The following subsection attends to that matter.

1.1 Electoral Systems

Since the ground-breaking works of Duverger and Rae, academics have sought to classify the main types of electoral systems and to analyze their consequences.¹⁹³ There are numerous ways for cataloguing electoral systems, for example by electoral formula, which determines how votes are counted to allocate seats,¹⁹⁴ by

¹⁹⁰ W. Riker, "The Two-Party System and Duverger's Law: An Essay on the History of Political Science", *American Political Science Review* 1982, Vol. 76, pp 753 – 766; G. Cox, *Making Votes Count: Strategic Coordination in the World's Electoral Systems* (Cambridge: Cambridge University Press 1997); M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems* (Oxford: Oxford University Press 2005); R. Katz, *Democracy and Elections* (Oxford: Oxford University Press 1997); A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press 1999); P. Norris, *Electoral Engineering: Voting Rules and Political Behavior* (Cambridge: Cambridge University Press 2004); M. Shugart and M. Wattenberg, *Mixed-Member Electoral Systems: The Best of Both Worlds?* (Oxford: Oxford University Press 2000); R. Taagepera, *Predicting Party Sizes – The Logic of Simple Electoral Systems* (Oxford: Oxford University Press 2007).

¹⁹¹ M. Shugart, "Comparative Electoral System Research: The Maturation of a Field and New Challenges Ahead", in M. Gallagher and P. Mitchell (eds.), *The Politics of Electoral Systems* (Oxford: Oxford University Press 2005), pp 25 – 56, at p 25.

¹⁹² A. Blais and L. Massicotte, "Electoral Systems", in L. LeDuc, R. Niemi and P. Norris (eds), *Comparing Democracies: Elections and Voting in Global Perspective* (London: Sage 1996), p 54.

¹⁹³ M. Duverger, *Political Parties, Their Organization and Activity in the Modern State* (New York: Wiley 1954); D. W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press 1967).

¹⁹⁴ IDEA, International Institute for Democracy and Electoral Assistance, *Electoral System Design: the New International IDEA Handbook* (Stockholm: IDEA 2005), p 28; P. Norris, *op.cit.*, p 41; A. Blais and L. Massicotte, "Electoral Systems", in L. LeDuc, R. Niemi and P. Norris (eds), *Comparing Democracies: Elections and Voting in Global Perspective* (London: Sage London 1996), p 54.

district magnitude, which refers to the number of seats per constituency,¹⁹⁵ or on ballot structure, which defines how voters express their choice.¹⁹⁶ This thesis divides the ‘families’ of electoral systems by electoral formula into three main families for greater clarity. Each electoral system has many sub-systems which will be explored further down below:¹⁹⁷

1. Plurality/Majority systems, also known as ‘first-past-the-post’,
2. Proportional Representation systems and
3. Combined or mixed systems, also named Two-Tier Districting and Mixed-Member Proportional systems.

Within these there are at least nine subgroups/subfamilies:¹⁹⁸

- electoral systems that fall under the first category of plurality/majority systems are: First Past The Post (FPTV), Block Vote (BV), Party Block Vote (PBV), Alternative Vote (AV) and the Two-Round System (TRS);
- List Proportional Representation (List PR) and the Single Transferable Vote (STV) are proportional systems;
- Mixed Member Proportional (MMP) or Two-Tier Districting (TTD) and Parallel systems are both examples of combined or mixed systems.

¹⁹⁵ For example, M. Gallagher and P. Mitchell, *The Politics of Electoral Systems* (Oxford: Oxford University Press 2005), Appendix A, p 579 distinguish those electoral systems based entirely on single-seat constituencies and those based either wholly or partly on multi-member constituencies;

¹⁹⁶ D. W. Rae, *The Political Consequences of Electoral Laws* (New Haven: Yale University Press 1967).

¹⁹⁷ IDEA, International Institute for Democracy and Electoral Assistance, *Electoral System Design: the New International IDEA Handbook* (Stockholm: IDEA 2005), p 28; P. Norris, *op.cit.*, p 41; A. Blais and L. Massicotte, “Electoral Systems”, in L. LeDuc, R. Niemi and P. Norris (eds), *Comparing Democracies: Elections and Voting in Global Perspective* (London: Sage London 1996), p 54.

¹⁹⁸ IDEA, *op.cit.*, p 3.

Moreover, there are systems such as the Single Non-Transferable Vote (SNTV), the Limited Vote (LV), and the Borda Count (BC), which do not fall under any of the three above mentioned subgroups. The Single Non-Transferable Vote is a multi-member-district, candidate-centred systems in which voters have one vote. Limited vote is very much like SNTV but gives voters more than one vote. However, unlike Block Vote not as many as there are seats to be filled. Borda Count is a preferential system in single- or multi-member districts.¹⁹⁹

Plurality/Majority systems

Plurality/Majority systems usually use single-member districts.²⁰⁰ In parliamentary general elections, the state is divided into territorial single-member constituencies. Within each constituency, voters can cast a single ballot for one candidate.²⁰¹ In a FPTP system, also known as a Single-Member Plurality (SMP) district system, the candidate with the most votes is elected. The biggest share of votes is hereby not necessarily an absolute majority of the votes. The mandate is awarded to whichever candidate receives a plurality of the votes, i.e. has more votes than the other candidates, whether this constitutes a majority of votes or not is not essential.²⁰² Candidates usually do not need to pass a minimum threshold of votes either. This is considered to be a simple and straightforward system, but liable for the election of candidates who do not have majority support.²⁰³ Because FPTP/SMP has a tendency towards producing single-party governments, government accountability is an advantage of FPTP/SMP systems. Voters have a

¹⁹⁹ IDEA, *op.cit.*, p 29.

²⁰⁰ IDEA, *op.cit.*, p 28.

²⁰¹ P. Norris, *op.cit.*, p 42.

²⁰² M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 579.

²⁰³ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 579.

clear choice between government and opposition parties. Therefore, decisiveness is another advantage of FPTP/SMP systems. However, disproportionality is a disadvantage of FPTP/SMP systems. All a candidate requires is a simple plurality, one more vote than the closest rivals is sufficient. Moreover, the system produces parliaments in which the distribution of seats does not closely reflect the distribution of votes at the election. Some voters may conclude that there is no point in voting for their most preferred candidate as this would result in a wasted vote and therefore vote for a less favoured challenger.²⁰⁴ Under a plurality electoral system, the number of parliamentary seats for a political party, and not its share of the popular vote, is decisive for the formation of government. A government may be sustained without a plurality of votes, as long as it has a majority in parliament available.²⁰⁵ As an example, in 1951, the British Conservative Party was returned to power with a sixteen seat majority in Westminster based on 48 per cent of the popular vote, although Labour gained a higher share of the vote with 48.8 per cent. Vice versa, in 1974 the Conservatives gained a slightly higher share of the vote, but Labour won more seats. Furthermore, governments are usually returned without a majority of the votes. None of the governments in the UK has won as much as half of the popular vote since 1935.²⁰⁶ Exempli gratia, Mrs Thatcher was returned to office with a parliamentary majority of 177 seats in 1983, but the support was less than a third of the total electorate (30.8 per cent).

²⁰⁴ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 580.

²⁰⁵ P. Norris, *op.cit.*, p 43.

²⁰⁶ P. Norris, *op.cit.*, p 44.

FPTP is criticised for excluding smaller parties from ‘fair’ representation.²⁰⁷ According to *Duverger’s law*, a ‘simple-majority single ballot system favours the two party-system’ as opposed to ‘both the simple-majority system with second ballot and proportional representation favour multi-partyism’.²⁰⁸ The FPTP system produces a manufactured ‘winner’s bonus’, exaggerating the proportion of seats won by the party in first place compared with their proportion of votes.²⁰⁹

FPTP is the oldest electoral system, dating back to the twelfth century at least.²¹⁰ FPTP systems are found primarily in the UK and those states that were historically influenced by Britain, for example in India, the US and many Commonwealth states. The US system is based on FPTP in single-member districts for multiple offices including congressional races for the House and Senate. Due to a survey of 199 states, undertaken by the *International Institute for Democracy and Electoral Assistance* (IDEA) in 2004, there are 47 cases or 24 per cent of the states and territories using FPTP for elections to national legislatures and lower houses.²¹¹ 91 countries or 46 per cent of the states of the world which have direct elections to the legislature, use Plurality/Majority systems.²¹²

A Plurality/FPTP system used in a multi-member district is called the Block Vote. Voters have as many votes as there are vacant seats. Voting is candidate centred. The candidates with the highest share of the votes win all of the seats in the electoral district, independent from the percentage of votes they gain. The Block

²⁰⁷ IDEA, *op.cit.*, p 37.

²⁰⁸ M. Duverger, *op.cit.*, pp 217, 239.

²⁰⁹ P. Norris, *op.cit.*, p 45.

²¹⁰ P. Norris, *op.cit.*, p 42.

²¹¹ IDEA, *op.cit.*, p 31.

²¹² IDEA, *op.cit.*, p 29.

Vote operates mainly in states and territories with weak or non-existent political parties as the Cayman Islands, the Falkland Islands, Guernsey, Kuwait, Laos, the Lebanon and Palestine.²¹³ With the change that voters vote for party lists instead of individual candidates, this system becomes the Party Block Vote.²¹⁴ In US presidential elections, members of the Electoral College are elected within each federal state on a plurality basis. The party slate that gets the highest number of votes in a state gets all the votes of that state in the Electoral College.²¹⁵ In the 1996 US presidential elections, President Clinton was returned with 70.4 per cent of the Electoral College vote, but his vote gain was based on a lead of only 50.1 per cent of the popular vote across the whole US. In the 2000 US presidential elections, the result gave the Democratic candidate Gore a lead of 0.4 per cent, but the Republican candidate Bush beat Gore by 271 to 267 votes in the Electoral College.²¹⁶

Both, the Alternative Vote and the Two-Round System, are Majoritarian systems. The winner needs to achieve an absolute majority of votes (i.e. 50 per cent + 1). In essence, each system makes use of voters' second preferences to produce a winner with an absolute majority if one does not emerge from the first round of voting.²¹⁷ Under AV, voters rank their preferences among candidates by writing '1' for their first choice, '2' for their second etc. The vote counting process might then take several stages and continues until a candidate has an absolute majority of the votes. In case no candidate receives an absolute majority of the voters' first

²¹³ IDEA, *op.cit.*, p 44.

²¹⁴ IDEA, *op.cit.*, p 28.

²¹⁵ A. Blais and L. Massicotte, "Electoral Systems", p 52.

²¹⁶ P. Norris, *op.cit.*, p 44.

²¹⁷ IDEA, *op.cit.*, p 28.

choices, the counting proceeds by eliminating the candidate with the least votes, and his or her votes are transferred to the candidates in accordance with the second preference marked on each ballot paper.²¹⁸ The process continues until an absolute majority is secured. The vote count systematically discriminates against those parties and candidates at the bottom of the poll to promote a single-party government for the winner.²¹⁹ AV is used in Australia, Fiji and Papua New Guinea.

The TRS, also called the Double-Ballot, requires a majority on the first ballot. If no candidate obtains an absolute majority, a second and final ballot, called run-off in the United States, is held between the two candidates who got the highest share of votes in the first round.²²⁰ Although the details of the second round vary in practice from case to case, this is the most common method for the second round. In France, however, every candidate who received a minimum of 12.5 per cent of the votes of the registered electorate in the first round can run in the second round. TRS is most common in presidential elections, but the electoral system is also used for elections to the lower house in France and several former French colonies, as well as in the US state of Louisiana. On the one side, this system can be regarded as enhancing the legitimacy of the winner as he or she needs the support of at least half of the voters, but on the other hand smaller parties are penalised and the need for citizens to go to the polls twice within a short period of time can hinder voters' enthusiasm and thereby turnout.²²¹

²¹⁸ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 580.

²¹⁹ P. Norris, *op.cit.*, p 50.

²²⁰ A. Blais and L. Massicotte, "Electoral Systems", p 56.

²²¹ P. Norris, *op.cit.*, p 49.

List Proportional Representation

The common principle to PR systems is to reduce the disparity between a party's share of the national vote and its share of the parliamentary seats.²²² If a political party wins 30 per cent of the popular vote, this should correspond to winning 30 per cent of the seats in parliament. Whereas adversarial democracies and Majoritarian electoral systems emphasise popular control by the party in government, consensus democracies and PR electoral systems focus on the inclusion of the various actors in society, emphasising the need for bargaining and compromise within parliament, government and the policy-making process.²²³ Electoral engineering of a PR system involves making at least four major decisions: the formula for translating votes into seats, the level of a legal threshold, the size of the constituency and the possibility of preferences for candidates.²²⁴ The electoral formula varies among PR systems. The two basic options are highest-average methods, which use a divisor, and the largest-remainders methods, which use quotas.²²⁵ The highest-average method requires the number of votes for each party to be divided successively by a series of divisors. The seats are allocated to parties that secure the highest resulting quotient, up to the total number of seats available.²²⁶ In other words, the process of seat allocation can be regarded as a process of awarding each seat to the party that presents the highest average: the average denoting the number of votes the party won divided by a number reflecting the number of seats it has already been awarded.²²⁷ Therefore, while the first seat goes to the largest party, its average is

²²² IDEA, *op.cit.*, p 29.

²²³ P. Norris, *op.cit.*, p 50.

²²⁴ A. Blais and L. Massicotte, "Electoral Systems", p 54.

²²⁵ A. Blais and L. Massicotte, "Electoral Systems", p 57.

²²⁶ P. Norris, *op.cit.*, p 51.

²²⁷ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 584.

reduced because of this when it comes to competing for the second seat. The exact results of the highest average method depend on the sequence of numbers used as divisors. The most widely used sequence is the *d'Hondt* formula, using divisors such as 1, 2, 3, 4, 5, and so on. The other main method is the *Sainte-Laguë* formula, which divides the vote with odd numbers (1, 3, 5, 7, 9...). This formula is hardly used in its pure form, but the *modified Sainte-Laguë* formula, which replaces the first divisor by 1.4, is more common, for example in Scandinavia. Out of those three highest-average methods, d'Hondt is acknowledged to favour the larger parties and pure Saint-Laguë to be the most unbiased method producing the most proportional results.²²⁸ The largest-remainder methods use a minimum quota, which is based on the number of votes cast and the number of seats to be awarded. Each party is awarded as many seats as it has full quotas, and if this leaves some seats unallocated, those remaining seats are distributed to the parties with the most votes left over.²²⁹ The most common method used is the *Hare* quota, in Germany also known as the *Hare/Niemeyer* quota. The Hare quota is calculated by dividing the number of votes by the number of seats. The Hare quota is regarded as unbiased between smaller and larger parties, producing the same results as Saint-Laguë.²³⁰

In most PR systems, legal thresholds are used to prevent splinter parties from entering parliament. Legal thresholds range from 0.67 per cent in The Netherlands to 7 per cent in Poland and 10 per cent in Turkey. Parties gaining less than this percentage will not be allocated any seats in parliament. The existence of

²²⁸ A. Blais and L. Massicotte, "Electoral Systems", p 59.

²²⁹ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 586.

²³⁰ M. Gallagher and P. Mitchell, *op.cit.*, Appendix A, p 588.

thresholds tends to increase the level of disproportionality, because it can have an important impact on the opportunities for smaller parties. District magnitude can also differ significantly between PR systems. Generally, the larger the constituency, the more proportional is the outcome, with better chances for small parties. List PR systems are used in 70 out of 199 states, giving them 35 per cent of the total.²³¹

Proportionality is regarded as being best achieved by the use of political party lists, but preferential voting is also regarded as a proportional electoral system.²³²

Under the Single Transferable Vote system voters rank-order candidates in multi-member constituencies. In most cases preference marking is optional. Voters do not have to mark all candidates and can mark only one. STV is currently used in legislative elections in Ireland, Malta, and for the Australian Senate. Proponents argue that by allowing citizens to mark their preferences within party lists, or by even ballot-splitting their votes across different parties in an open list system, STV provides greater choice than other systems.²³³

Mixed Member Systems/Two-Tier Districting Systems

Mixed systems use both a PR element and a plurality/majority element running independently from each other.²³⁴ In a Parallel System, a fixed number of seats is allocated by SMP/FPTP, and the rest of the seats are elected by List PR. Mixed Member Proportional systems also use two elements, with the difference that the PR element compensates for any disproportionality arising under the

²³¹ IDEA, *op.cit.*, p 31.

²³² IDEA, *op.cit.*, p 29.

²³³ P. Norris, *op.cit.*, p 55.

²³⁴ IDEA, *op.cit.*, p 29.

plurality/majority system. Such Two-Tier Districting systems use small districts at the lower level and very large districts at the upper level. Usually, single-member districts are combined with a nationwide list system. TTD systems with a national upper-tier can be equally proportional as List PR systems, but combine an overall proportional result with close voter-representative contact at the lower-tier. Usually, an electoral threshold is imposed on the upper tier. In the German TTD system, for example, a 5% threshold is imposed. The number of constituency seats a party wins under the first vote is subtracted from the number of list seats it is being allocated by its result under the second vote. The second vote is therefore the decisive vote, as it determines the share of mandates a party gains. Still, this system can lead to the creation of the so-called *Überhangmandate*, literally surplus mandates or surplus seats: when a party wins more constituency seats in one *Land* than the total to which its share of second votes would entitle it, surplus mandates are created. Whenever this situation occurs, the party is allowed to retain these extra seats and the size of the *Bundestag* is temporarily enlarged.²³⁵ After having provided this overview on the choice of electoral systems, the following subsection looks at the effects of electoral systems.

1.2 Electoral Systems and Voting Behaviour

Electoral systems are considered to have both ‘mechanical’ and ‘psychological’ effects.²³⁶ Different electoral systems tend to encourage different kinds of party systems. This is called the mechanical effect. Mechanical effects are those that follow directly from electoral rules.²³⁷ Whereas plurality/majority systems tend to

²³⁵ D. Farrell, *op.cit.*, p 212.

²³⁶ IDEA, *op.cit.*, p 6.

²³⁷ A. Blais and L. Massicotte, “Electoral Systems”, p 67.

have a constraining effect on party numbers, proportional systems tend to be more accepting, resulting in a greater diversity of political parties. Psychological effects pertain to how parties and voters react to electoral rules. Voters may change their behaviour because of their expectations about the mechanical effects of electoral systems and about how other actors will act.²³⁸ The psychological impact of electoral systems intensifies the mechanical effect: in a FPTP system, voters who wish to support a small party are often faced with a dilemma as to how best to avoid ‘wasting’ their vote, as only one candidate can be elected from any single-member district. As a result, many voters will not express their sincere choice but rather will vote for another candidate from a major party who they believe has a realistic chance of winning the seat. As one outcome, larger parties are strengthened at the expense of smaller ones. Proportional systems or systems that allow multiple ballot choices are more likely to facilitate the election of small parties, and hence the pressure to vote strategically is reduced.²³⁹ Whereas psychological effects affect the vote, mechanical effects affect the outcome of the vote.²⁴⁰

According to Duverger’s first law, ‘the plurality single-ballot rule tends to party dualism’. The second law states that ‘the double ballot system and proportional representation tend to multipartyism’.²⁴¹ Those statements have attracted considerable debate marked by continued reformulations of the original statement.²⁴² In an investigation on the capacity of electoral systems to shape

²³⁸ A. Blais and L. Massicotte, “Electoral Systems”, p 67.

²³⁹ IDEA, *op.cit.*, p 7.

²⁴⁰ A. Blais and L. Massicotte, “Electoral Systems”, p 67.

²⁴¹ M. Duverger, *op.cit.*, pp 217, 239.

²⁴² P. Norris, *op.cit.*, 82.

patterns of party competition, Norris has confirmed some of the basic patterns in the relationship between electoral systems and party systems.²⁴³ The analysis generally supports Duverger's generalisation that plurality electoral systems tend towards party dualism, whereas proportional representation is associated with a multi party system. Majoritarian elections usually generate one-party governments with a secure parliamentary government, while proportional systems lead towards more inclusive multiparty parliaments. Still, minor parties *can* do well in gaining seats under FPTP, especially regional or ethnic-national parties with locally concentrated support, while parties of that category can also be heavily penalised in proportional systems with high thresholds and small electoral districts.²⁴⁴

Colomer has described the preference of political parties for a particular electoral system by the rule 'the small prefer the large, and the large prefer the small'.²⁴⁵ Large assemblies, large electoral district magnitudes, and List PR allocation formulas with a large quota or large gaps between successive divisors enhance the chances for smaller parties. This section has analysed the mechanical and psychological effects of electoral systems. The following subsection turns to the central matter of the connection of electoral systems and representation.

1.3 Electoral Systems and Representation

The matter of representation is a central issue in the study of electoral systems. In this section I shall focus on the relationship between electoral system design and the process of representation. Representation means a 'making present again'.²⁴⁶

²⁴³ P. Norris, *op.cit.*, 94.

²⁴⁴ P. Norris, *op.cit.*, 95

²⁴⁵ J. Colomer, "The Strategy and History of Electoral System Choice", in J. Colomer (ed), *Handbook of Electoral System Choice* (Houndmills: Palgrave Macmillan 2004), p 3.

²⁴⁶ C. Friedrich, *Constitutional Government and Democracy* (Boston: Ginn and Co. 1950), p 267.

Generally, representation means ‘the making present in some sense of something which is nevertheless not present literally or in fact’.²⁴⁷

The historic controversy about the nature of representation has focused on the role of representatives. Should representatives be regarded as *delegates* or *trustees*? Madison argued for a delegate conception of representation: only if each representative pursued the factious interests of his constituency, the various interests in the nation could balance each other off in the government.²⁴⁸ A delegate representative must therefore pursue the interest of the constituents. Burke, on the other hand, argued that representatives should act as trustees.²⁴⁹ Parliament was ‘not a congress of ambassadors from different and hostile interests, but a deliberative assembly of one nation, with one interest, that of a whole.’²⁵⁰ Under Burke’s conception of representation, a representative does not have any close relationship to his constituency, but to the interests of the nation as a whole. He represents the nation, not his constituency. A trustee representative therefore decides himself on the action to pursue. While the delegate representative is bound to follow the interests of his constituency, the trustee delegate is more independent.

Pitkin puts this classic controversy into the context of wishes and welfare. These two elements formed two apparently opposing ends of the debate about the

²⁴⁷ H. Pitkin, *The Concept of Representation* (Berkeley: University of California Press 1967), pp 8, 9.

²⁴⁸ J. Madison, *The Federalist No.10*, “The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued)”, Daily Advertiser, Thursday, 22 November 1787, URL: <http://www.constitution.org/fed/federa10.htm>, on web 2 March 2010.

²⁴⁹ E. Burke in *Burke’s Politics*, R. Hoffman and P. Levack (eds.), (New York: Alfred A. Knopf 1949), p 116.

²⁵⁰ *Ibid.*

meaning of representation.²⁵¹ Pitkin rephrases the dispute as follows: ‘Should (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to act as seems best to him in pursuit of their welfare?’²⁵² The conflicting interests of a representative’s judgment on the one side and the constituents’ interests on the other were misleading according to Pitkin, as both elements were involved in every concept of representation.²⁵³ Representation as an idea implied that normally these two elements coincide.

Pitkin identifies four different conceptions of representation: formalistic representation, descriptive representation, symbolic representation and ‘substantive acting for’ representation.²⁵⁴ Formalistic representation draws on the dimensions of authorisation and accountability, on the means by which a representative obtains his position and on the ability to punish their representatives for failing to act according to their wishes.²⁵⁵ Descriptive representation refers to the way the representative is ‘standing for’ the represented. Descriptive representation requires the legislature to be selected in a way that its composition corresponds to that of the whole nation.²⁵⁶ As John Adams famously advocated, the legislature ‘should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them’.²⁵⁷ This approach differs from the formalistic conception of representation as it does not use authority or accountability, but depends on the representative

²⁵¹ H. Pitkin, *op.cit.*, p 145.

²⁵² H. Pitkin, *ibid.*

²⁵³ H. Pitkin, *op.cit.*, p 165.

²⁵⁴ H. Pitkin, *The Concept of Representation* (Berkeley: University of California Press 1967).

²⁵⁵ H. Pitkin, *op.cit.*, p 38.

²⁵⁶ H. Pitkin, *op.cit.*, p 60.

²⁵⁷ J. Adams, *Works* (Boston: Little, Brown and Co. 1852-1865), p 205.

characteristics. Symbolic representation refers to symbols such as a flag, but also to human beings such as a king or a president. Symbols too can make something present by their presence, although it is not really present in fact.²⁵⁸ Substantive representation, in contrast to earlier mentioned modes of representation, describes a form of representation centred around the activity of representing itself. Substantive representation asks whether activities are taken on behalf and in the interest of the represented.²⁵⁹

Pitkin has had a strong influence on the understanding of representation in the field of political science. Especially her argument about the opposition of formalistic and descriptive modes of representation has provided a pivotal framework. Although differing designations have been used, many scholars have used similar frameworks to map the various concepts of representation. McLean, for example, uses the dichotomy of the microcosm and the principal-agent conceptions of representation.²⁶⁰ The microcosm conception of representation has the ideal that parliament is representative in the sense that it includes all relevant groups of society of a certain age, sex, class, ethnicity etc. in the same proportions as the electorate.²⁶¹ The microcosm conception is therefore similar to Pitkin's descriptive representation. The principal-agent conception resembles the formalistic mode of representation.

²⁵⁸ H. Pitkin, *op.cit.*, p 92.

²⁵⁹ H. Pitkin, *op.cit.*, p 112.

²⁶⁰ I. McLean, "Forms of Representation and Systems of Voting", in D. Held (ed), *Political Theory Today*, (Cambridge: Polity Press 1991), pp172-196, at p 173.

²⁶¹ I. McLean, *op.cit.*, p173.

Reeve and Ware have criticised the microcosm conception because there is an infinite number of possible characteristics of the general population, so that some have to be picked out.²⁶² It is possible to ‘overdo’ representation, e.g. to demand parliament to contain the same proportion of farmers or pensioners. The relatively small number of members of parliament who are not university graduates and the small number who belong to an ethnic minority have drawn criticism.²⁶³ A second objection to the microcosm conception is whether the representative needs to share the same interests as the electorate to be able to protect these interests.²⁶⁴

Norris uses a threefold conception of representation.²⁶⁵ Under the responsible party government model, voters choose between parties rather than individual candidates. What the party stands for is important, not so much who is running for office. The district delegate model focuses on the representative as an agent of a geographic area. This model corresponds to the formalistic and principal agent conceptions. Social representation asks whether the composition of the legislature reflects society, e.g. under the criteria of gender, class, language, or ethnicity and is equivalent to the microcosm model. Harrop and Miller use another fourfold conception of representation.²⁶⁶ The first stresses the idea of resemblance and reflects the idea of parliament as a microcosm. The constituency service conception has its roots in formalistic and substantive models of representation. The trustee model stresses the independence of legislators and has its origins in

²⁶² A. Reeve and A. Ware, *Electoral Systems: A comparative and theoretical introduction* (London: Routledge 1992), p 85.

²⁶³ A. Reeve and A. Ware, *op.cit.*, p 85.

²⁶⁴ Reeve and A. Ware, *op.cit.*, p 86.

²⁶⁵ P. Norris, “Legislative Recruitment“, in L. LeDuc, R. Niemi and P. Norris (eds), *Comparing Democracies: Elections and Voting in Global Perspective* (Thousand Oaks: Sage Publications 1996), p 184.

²⁶⁶ M. Harrop and W. Miller, *Elections and Voters: A Comparative Introduction* (Houndmills: Macmillan 1987), p 245.

the strongly elitist conception of the representative by Edmund Burke. The party model, as I have already mentioned when describing Norris' framework, focuses on political parties and not individual candidates.

IDEA, the International Institute for Democracy and Electoral Assistance, an intergovernmental organisation with the aims of supporting new democracies and democratic reform in general, uses another fourfold framework of representation.²⁶⁷ Representation may take at least four forms: geographical, ideological, party-political and descriptive. Whereas the first resemble formalistic and principal-agent conceptions, the latter is similar to microcosm and descriptive models. Mansbridge identifies four forms of representation: promissory, anticipatory, gyroscopic and surrogate representation.²⁶⁸ Promissory representation is similar to formalistic and principal-agent conceptions, as it is concerned with aspects of authorisation and accountability. Anticipatory representation focuses on the perspective of parliamentarians on what voters will reward in the next elections. Gyroscopic representation centres around legislators' own experience as a basis for their actions. Surrogate representation means representation by a representative with whom the voter has no electoral relationship, a representative from another constituency. None of the latter three conceptions meets the criteria for democratic accountability, as promissory representation does.²⁶⁹ But the purpose, in Mansbridge's terms, is to generate a set of normative criteria by which it can be judged.²⁷⁰

²⁶⁷ IDEA, International Institute for Democracy and Electoral Assistance, *Electoral System Design: the New International IDEA Handbook* (Stockholm: IDEA 2005), p 60.

²⁶⁸ J. Mansbridge, "Rethinking Representation", APSR, Vol. 97, No. 4, pp 515-528, at p 515.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

The various conceptions of representation are partly overlapping, of course. As can be seen, the patterns of principal-agent and formalistic models on the one side and of descriptive and microcosm conceptions on the other keep reoccurring. Which conception of representation should be regarded as ideal? Whereas microcosm and descriptive conceptions are suggestive of proportional representation, principal-agent and formalistic conceptions are suggestive of majoritarian electoral systems. Proportional electoral systems refer to the composition of parliament, whereas Plurality/Majoritarian systems refer to matters of authorisation and accountability.

List PR systems make it more likely that representatives of minority groups are elected.²⁷¹ Political parties can be encouraged by PR systems to put together balanced candidate lists which cover the whole spectrum of interests in society. Lijphart argues that PR has the great advantage of enabling any minority to be represented, as long as they achieve a minimum level of electoral support.²⁷² For example, List PR enhances the probability of women to be elected. The share of women representatives is the ‘most easily measurable aspect of microcosmic representation’.²⁷³ Evidence provides that the basic type of electoral system does influence opportunities for women to be elected in office.²⁷⁴ Political parties are able to use lists to promote the advancement of women politicians and allow voters to elect women candidates while still basing their choice on other political issues than gender. In general, women are more successful in being nominated

²⁷¹ IDEA, *op.cit.*, p 60.

²⁷² A. Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990* (Oxford: Oxford University Press, 1994), p 140.

²⁷³ M. Gallagher and P. Mitchell, *op.cit.*, p 555.

²⁷⁴ See, for example, D. Farrell, *op.cit.*, p 166 and P. Norris, *op.cit.*, p 208 and M. Gallagher and P. Mitchell, *op.cit.*, p 555.

and elected under proportional systems. For single member districts, on the other side, most parties are encouraged to set up a candidate who is ‘most broadly acceptable’, and that person is seldom a woman.²⁷⁵

Electoral systems with large districts encourage parties to set up a candidate list including minorities because a balanced list increases their electoral chances. A low or no threshold at all can further enhance chance for minorities to be represented in parliament, as well as a plurality/majoritarian system with deliberate recognition of predetermined minority groups.²⁷⁶ Different conceptions of representation rest on widely differing principles based on alternative democratic theories. The matter which conception of representation is ideal or best therefore depends largely on the democratic model to be used. In Chapter One, Section 3.3, I have introduced Lijphart’s majoritarian and consensus models of democracy. Whereas the majoritarian democratic model and principal-agent and formalistic conceptions of representation with majoritarian electoral systems are mutually dependent, so are the consensus model and microcosm and descriptive conceptions with proportional representation. After having identified the interaction of electoral systems and representation, the last subsection of Section 1 looks at the consequences of electoral systems for providing legitimacy.

1.4 Electoral Systems: Consequences for Providing Legitimacy

Making a political system democratic is considered a central function of elections, at least in the negative sense that no modern system without elections conducted

²⁷⁵ IDEA, *op.cit.*, p 61.

²⁷⁶ P. Norris, *op.cit.*, p 228.

under universal suffrage would be considered democratic.²⁷⁷ If democracy is taken virtually universally to be the only acceptable form of government, this ‘becomes a general argument about the legitimacy of a political system, which is legitimate because it is democratic, and democratic because it holds elections’.²⁷⁸ For being able to fulfil their task of providing legitimacy, elections must be consistent with the view of democracy adopted by those who are to accept the legitimacy of the system. Elections should therefore enjoy widespread acceptance. In Katz’s words, ‘to *confer* legitimacy is to lead people to think in a certain way. To *confirm* legitimacy is to produce a visible sign that they do think in that way.’²⁷⁹ In democratic systems, turnout in elections and votes for parties that reject the legitimacy of the system can serve as relevant indicators. A very low turnout or a very high share of the vote for anti-system parties can call into question the legitimacy of the system. If elections can provide evidence of a system’s legitimacy, then this works both ways: elections also provide the electorate with an opportunity to show their disapproval of the system’s legitimacy.

Elections are not considered to be sufficient by themselves for representative democracy, but as a necessary *sine qua non* condition.²⁸⁰ At minimum, elections have to meet certain conditions to ensure democratic legitimacy: elections should be free of violence, intimidation, bribery, vote rigging and irregularities such as systematic fraud and deliberate partisan manipulation. In elections, choice between parties and candidates should be unrestricted, without repression of

²⁷⁷ R. Katz, *Democracy and Elections* (Oxford: Oxford University Press 1997), p 101.

²⁷⁸ R. Katz, *op.cit.*, p 102.

²⁷⁹ R. Katz, *op.cit.*, p 102.

²⁸⁰ P. Norris, *op.cit.*, p 4.

opposition parties or unjustified differentiation in the distribution of campaign resources and media access. Elections are expected to be free, fair, conducted by universal suffrage, by equal and secret ballot and should be a transparent process from voter registration to the final vote tally. Members of parliament are expected to reflect the society from which they are drawn and not to systematically exclude any minority group; election campaigns are further expected to generate widespread public participation.²⁸¹

Having provided this survey on the terminology of electoral law, the various electoral systems and their political consequences on the matters of representation and legitimacy, the question which electoral system is preferable or best arises.

2. Is There Any Such Thing As an Ideal Electoral System?

There is a debate among scholars about which electoral system should be regarded as the ‘best’ or ‘ideal’ electoral system. I intend to provide a brief overview of this academic debate to see what we can learn from this discussion for the construction of an indicative ideal type model for elections to the European Parliament under the federal model.

Views on the ideal model electoral system can be grouped into two broad categories: first, some scholars have a clear preference for a particular electoral system, although there is hardly any agreement among academics on what the ideal electoral system looks like. Second, some scholars of electoral systems rule

²⁸¹ P. Norris, *op.cit.*, p 4.

out the possibility of having *one* ideal system that covers *all* circumstances, as this would depend largely on the applicable criteria at the time of construction of an electoral law. So what does an ideal type electoral system look like in general according to the first group?

One of the main arguments in the debate about electoral systems has been about the advantages and disadvantages of Plurality and PR systems. Plurality systems are associated with stable one-party majority governments, whereas proponents of PR favour this formula for its broad and fair representation. Apart from stability, greater accountability is named as another advantage of one-party majority governments. Because accountability results from decisiveness, an electoral decision with a direct effect on the formation of a government can be said to lead to greater accountability.

Sartori criticises the school of thought that proportional systems were inherently superior to plurality systems and that they therefore always had to be preferred. He particularly counters the argument that the 'uppermost requirement of representative democracy is fair representation, and that representation is fair only when it is proportional'.²⁸² He argues that the case for PR did not need any grand theory, and that it therefore could be encapsulated in the simple and straightforward argument that it is representative government which is the very essence of democratic politics. Sartori clearly favours Majoritarian-Plurality systems in the form of the Double-Ballot system over all other systems, especially when they produce a two-party system which results in a single party responsible

²⁸² G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York: New York University Press, 1994), p 69.

government. He awards Majoritarian systems the ability to keep party fragmentation low, and thereby to foster effective government. Sartori admits that PR, when corrected, can accomplish adequate representation and sufficient governability. PR might therefore be helpful for particularly difficult societies, but it might also, in the ‘extremist package recommended by Lijphart’, turn out to be a ‘kiss of death’.²⁸³ He especially considers Mixed Member Proportional systems as, for example, Plurality-PR couplings, a ‘mismatch, a very unsound and counterproductive arrangement’²⁸⁴, because they would, instead of bringing together the best of both worlds, result in a ‘bastard-producing hybrid which combines their defects’. Government accountability and decisiveness of the vote are the favoured values of Plurality/Majority system supporters.

Advocates of PR, on the other side, prefer this electoral system for its fairness and responsiveness.²⁸⁵ PR systems are regarded as being fair because they intend to allocate each party a number of mandates equivalent to its share of votes. PR is regarded to lead to fairer representation than the family of plurality systems. This leads to a greater diversity of viewpoints to be expressed in parliament, because more political parties are represented. Proponents of PR regard it as particularly suited for societies with deep ethnic or linguistic cleavages, because of its capability to represent minority groups within political parties and in Parliament.

²⁸³ G. Sartori, *op.cit.*, p 74.

²⁸⁴ G. Sartori, *op.cit.*, p 74.

²⁸⁵ A. Blais and L. Massicotte, “Electoral Systems”, in L. LeDuc, R. Niemi and P. Norris (eds), *Comparing Democracies: Elections and Voting in Global Perspective* (Thousand Oaks: Sage Publications 1996), 49-81, at p 74.

Reynolds sees evidence that presidential systems and Plurality and Majority electoral systems lead to ‘the democratic cousin of Hobbes’ all-powerful Leviathan state’, leading towards an ethos of exclusion, and in contrast values parliamentarism, PR and power-sharing structures as the foundational level of inclusion.²⁸⁶ In his study on electoral systems in Southern Africa, he finds examples of ethnically divided states where PR and federalism enabled the combatant parties to opt for the positive sum strategy of democratic competition.

Lijphart observes that the degree of electoral proportionality and disproportionality responds very sensitively to the rules of the electoral system, as much as two thirds of the variance in disproportionality could be explained by the electoral system alone.²⁸⁷ According to these findings, the electoral system offers the opportunity to fine-tune for the purpose of greater proportionality. Lijphart claims there was ‘wellnigh universal agreement that electoral proportionality is a major goal of electoral systems’ as well as a major criterion by which they should be judged.²⁸⁸ He describes proportionality as a goal in itself, synonymous with electoral justice, as well as an important means for minority representation. Moreover, Lijphart underlines the strong link between the electoral system and the effective number of parties in parliament.²⁸⁹ The effective threshold and Plurality in particular are considered the strongest instruments of electoral engineers to influence the political party system. Lijphart further questions the conventional assumption that two-party systems make for more effective and stable democracy,

²⁸⁶ A. Reynolds, *Electoral Systems and Democratization in Southern Africa* (Oxford: Oxford University Press 1999), p 268.

²⁸⁷ A. Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990* (Oxford: Oxford University Press 1994), p 139.

²⁸⁸ A. Lijphart, 1994 *op.cit.*, p 140.

²⁸⁹ A. Lijphart, 1994 *op.cit.*, p 142.

because they had no better record with regards to areas such as the stimulation of economic growth, the control of inflation and unemployment or the maintenance of public peace than multi-party parliamentary systems. He acknowledges the advantage of clear government accountability though, but argues that greater accountability does not translate into better responsiveness to citizen's interests; there was no evidence that coalition governments in multi-party systems were less responsive than one-party majority systems. Lijphart agrees that the choice between PR and Plurality systems depends on the emphasis one puts on values such as proportionality and minority representation on the one hand or government accountability on the other. He regards Two-Tier districting PR or Mixed Member Proportional as a particularly attractive way of combining the advantage of close representation by representative-voter contact in small constituencies with the greater proportionality of high-magnitude districts. Taagepera agrees in principle and, although he voices a tendency for keeping electoral systems simple, he admits that he 'instinctively' favours personalised PR and STV.²⁹⁰ Although Bowler and Farrell accept the answer 'it depends' in the search for 'the best' electoral system, their hunch is that MMP is 'the best of both worlds'.²⁹¹ Shugart describes Open-list systems as the most appealing versions of Preferential-List PR, because of the set of options available to the voter,²⁹² but he and Wattenberg have a preference for Mixed-Member Proportional systems as well, because they have the advantage of generating a two-block party system

²⁹⁰ R. Taagepera, *Predicting Party Sizes: The Logic of Simple Electoral Systems* (Oxford: Oxford University Press 2007), p 274.

²⁹¹ S. Bowler and D. Farrell, "We Know Which One We Prefer but We Don't Really Know Why: The Curious Case of Mixed Member Electoral Systems", (2006) Vol. 8 *The British Journal of Politics and International Relations (BJPIR)* 445-460, at p 458.

²⁹² M. Shugart, "Comparative Electoral System Research: The Maturation of a Field and New Challenges Ahead", in M. Gallagher and P. Mitchell (eds), *The Politics of Electoral Systems* (Oxford: Oxford University Press 2005), 25-56, at p 44.

without reducing minor parties to insignificance; Mixed-Member Proportional systems were also the most likely to combine generating local accountability with a nationally oriented party system. Although these objectives might be achieved by other electoral systems such as STV or open-list PR as well, those would lead to undesired side-effects such as intra-party competition and factionalism.²⁹³

Among the group of scholars who are prepared to name their ‘favourite’ electoral system, there is hardly any agreement on one particular system, although there may be a trend towards Two-Tier Districting systems. Other scholars of electoral systems come to the conclusion that no single answer can exist to the question of the ideal electoral system. As Blais and Massicotte have observed, the debate about ‘the best’ electoral system has touched on every dimension of electoral systems, the electoral formula, the ballot structure and district magnitude.²⁹⁴ They support the argument that a good case can be made for almost any electoral system, because of ‘alternative visions of democracy’ and due to the fact that electoral engineering does not aim to accomplish ‘one but many objectives, which entail trade-offs’.²⁹⁵ Farrell and Scully argue that differences of opinion with regards to electoral systems are perfectly understandable, as it would be very difficult to make categorical statements about the best electoral institutions for all circumstances, ‘given the various permutations that can occur in electoral system design, and the wide range of consequences that flow from these permutations, whether for the partisan, ethnic, or socio-economic composition of the parliament,

²⁹³ M. Shugart and M. Wattenberg, *Mixed-Member Electoral Systems – The Best of Both Worlds?* (Oxford: Oxford University Press 2003), p 591.

²⁹⁴ A. Blais and L. Massicotte, *op.cit.*, p 72.

²⁹⁵ A. Blais and L. Massicotte, *op.cit.*, p 73.

the makeup of the government, the nature of policy-output, styles of representation, overarching system stability, engagement of voters, and so on'.²⁹⁶

'It all depends' appears to be the most valid summary of this discussion. Even among scholars who favour one particular electoral system over all others, most are willing to admit that the decision for an 'ideal type' depends largely on the vision of democracy itself. So if it all depends, how can the democratic deficit of the EU which exists under the federal model be remedied? In what way can an ideal type electoral system add competition to consensus democracy?

3. Implications for the Conception of an Ideal Type Electoral System

This section ties the various dimensions of Chapters One and Two together, while pointing towards their implications for EU electoral reform. Section 1 of Chapter Two surveyed the field of electoral law, the various electoral systems operating in the EU and their political consequences. This survey was followed by an overview of the academic debate on the existence of a 'best' electoral system in Section 2. Scholars and commentators often appear reluctant to identify any electoral system as best. We can argue that the choice of the most appropriate electoral system depends largely on the model or form of democracy preferred by a particular commentator.

Chapter One considered the democratic model for the EU. In its current state, the Union represents a highly consensual democracy. According to the federal model, a link between EU citizens and policy-making which might address the

²⁹⁶ D. Farrell and R. Scully, *Representing Europe's Citizens? – Electoral Institutions and the Failure of Parliamentary Representation* (Oxford: Oxford University Press 2007), p 205.

democratic deficit is largely missing. To develop this link, the implementation of a competitive element in the consensus democracy of the EU is needed, thereby bringing the EU from an extreme consensual model closer towards the majoritarian end of the continuum. Conceptually, a parliamentarisation of the EU might be achieved by connecting the democratic model of a consensus democracy with a competitive element to the matter of electoral system reform. Such a electoral reform could pave the way for a European political party-based democracy. If the European Parliament manages to establish an electoral connection to its citizenry, it could become the main arena of democracy in, and the central legitimating mechanism for, a federal model of the EU.

As Verba et al. observe competitive elections are ‘the distinctive feature of democracy and the one which allows us to distinguish democracy from other political methods’.²⁹⁷ In a parliamentary system, elections can fulfil the role of

- legitimising the political system;
- transferring trust to parties and candidates;
- recruiting a political elite;
- representing opinions and interests of the electorate;
- connecting voters’ preferences with political institutions;
- mobilising the electorate for political programmes and parties;
- sensitising citizens for political problems by explaining alternatives;
- bringing about a contest for political power on the basis of alternative political programmes;

²⁹⁷ S. Verba, N.H. Nie and J. Kim, *Participation and Political Equality* (Cambridge: Cambridge University Press 1978), p 4.

- and building a parliamentary majority to form government and opposition.²⁹⁸

It is hard to imagine a European electoral system meeting these criteria unless it has a *common* or *shared* electoral system, although the question remains to what degree the EU electoral system should be uniform. A greater harmonisation should not be pursued for uniformity's sake, but may be necessary to bring the European electoral system in accordance with the federal model of the EU. Federalism may require the democratic model of a consensus democracy to develop a more competitive electoral element. I will turn to these issues in more detail in Chapter Six. Before doing so, however, Chapters Three to Five will address the current system of electoral laws for elections to the European Parliament and its implications and analyse recent developments in the field of electoral reform in the European Parliament.

Conclusion

This Chapter has provided an overview of the key concepts and the terminology of electoral systems in use, which shall also be used to evaluate current systems in use for European Parliament elections in Chapter Three and latest reform attempts in Chapter Four. In addition, Section 1 analysed the consequences of electoral laws on party systems and voting behaviour, representation and legitimacy.

An ideal type electoral system depends largely on the democratic model which is applied. Whereas the majoritarian democratic model corresponds to principal-

²⁹⁸ D. Nohlen, *Wahlrecht und Parteiensystem* (Opladen & Farmington Hills: Verlag Barbara Budrich, 5th edition 2007), p 35.

agent forms of representation and majoritarian electoral systems, the consensus model corresponds to microcosm conceptions of representation with proportional representation. Combining proportionality with a possible close contact between voters and candidates in constituencies are conflicting aims in constructing an ideal type electoral system to provide legitimacy to the European Union. In Chapter Six I will suggest that a TTD/MMP system best addresses the democratic deficit that exists under the federal model of the EU and my corresponding democratic model of a consensus democracy with a competitive element. Before turning to this indicative ideal type, I will develop an analysis of the history of electoral law for the European Parliament in Chapter Three and of debates around its reform in the Chapters Four and Five.

CHAPTER THREE

THE CURRENT SYSTEM OF ELECTORAL LAWS

FOR ELECTIONS TO THE

EUROPEAN PARLIAMENT AND ITS IMPLICATIONS

Introduction

This Chapter analyses the current system of electoral laws for elections to the European Parliament and its effect on the democratic deficit of the EU under the federal model. Despite the option in 1952 of having a directly elected assembly in the ECSC Treaty and the Treaty obligation of the EEC Treaty since 1957 for a uniform electoral system, European Parliament elections operate on the bases of 28 different national electoral systems in the 27 member states. Section 1 examines past attempts on both direct elections as well as a uniform system through the lens of the three overarching models of the EU, which has never been attempted before: through the models of the EU as an international organisation, a supranational technocratic regime, and the EU as a federal model.

The author has went to great lengths with the support of MEPs and their advisors, of services of the European Parliament and European Documentation Centres to collect primary sources in the form of Reports and further official documents on electoral systems of member states and to have the densest possible body of source material, ranging from the early fifties to today.

Section 2 shall provide some further insights into the democratic deficit by exploring the current system of electoral laws in elections to the European Parliament. The European Parliament's website as well as major publications have shown divergences from the current state more than once, but this thesis presents an accurate account of key aspects of national electoral laws.

As the national arena is the determining context in elections to the European parliament, I shall analyse the implications for the democratic deficit of the

federal model more closely in the final Section 3. An evaluation of electoral behaviour in the European Union is conducted with the help of the Second-Order National Elections model, the electoral cycle model, and the ‘Europe matters’ model. Section 3 provides evidence that European elections can provide democratic legitimacy according to the federal model if the electoral system is amended to foster competition between European parties on European matters. Sources for the analysis include results of the PIREDEU project, ‘the most ambitious data collection effort on European Parliament elections to date’,²⁹⁹ the 2009 OSCE/ODIHR Report, the first ever in the history of European Parliament elections, as well as major publications on the subject matter of the past three decades. I shall start off with an analysis of the Assembly’s attempts to become directly elected.

1. The European Parliament’s Attempts to Agree on a Uniform Electoral Procedure So Far

There are currently 28 different national electoral systems of extreme variety employed in the 27 member states for European Parliament elections. However, in 1952 the ECSC Treaty provided for the option of having a directly elected assembly, and there has been a mandate for a uniform electoral system as early as 1957. Repeated attempts have been made to respond to this mandate and this Section examines past attempts through the lens of the three overarching models of the EU which I am deploying throughout this thesis: the models of the EU as an international organisation, a supranational technocratic regime, and the EU as a federal model. Under the international organisation model, democracy on a

²⁹⁹ Sara B. Hobolt and Mark N. Franklin, “Introduction: Electoral Democracy in the European Union”, (2011) Vol. 30, *Electoral Studies*, pp 1-3, p 1.

European scale is considered as counterproductive and even damaging. The supranational technocratic model regards democracy as equally redundant. The democratic deficit comes through most powerfully through the federal model.

In this Section, I draw on my collection of primary sources and documentation for the investigation on Parliament's past attempts on electoral reform. As noted above, the engagement with the matter of electoral reform takes place from the viewpoint of the three models, which has never been attempted before.

For reasons of clarity and comprehensibility, I deploy a chronological order of primary documentation for the evaluation of original documents. The investigation shall have a focus on the issues and debates around electoral reform, such as matters of legitimacy and a perceived democratic deficit. In the first subsection of Section 1, I cover the period of time up to the first direct elections to the European Parliament in 1979. The second subsection covers the period of time from 1979 to the Anastassopoulos Report, which has been Parliament's last Report amending the 1976 Elections Act and first applied in the 2004 European Parliament elections.

1.1 Phase One: Before the first direct elections to the European Parliament by universal suffrage

The period of time from the founding years of the European Communities in the early fifties to the first direct elections by universal suffrage in 1979 was characterized by the competing interests of direct elections on the one side and a uniform electoral system on the other. The Assembly was faced with a dilemma,

which of the two objectives should be a priority: to be directly elected first, based on national provisions, or working out a uniform system together with member states in the Council and have direct elections at a later stage. Elements of all three models can be ascertained in the early stages of integration: the supranational technocratic model is reflected by originally envisaging a Common Assembly of delegated members. It has to be noted though that Article 21 (1) ECSC as early as 1951 stated that:

‘The Assembly shall consist of delegates who shall be designated by the respective Parliaments once a year from among their members, or who shall be elected by direct universal suffrage, in accordance with the procedure laid down by each High Contracting Party’.³⁰⁰

Article 21 (1) ECSC originally provided for two methods for the selection of Assembly Members, before it was amended by Article 2 of the Convention on Certain Institutions common to the European Communities, signed at the same time as the Treaties of Rome in 1957:

- Designation of Assembly Members by national parliaments for a one-year term *and*
- election of AMs by direct universal suffrage on a national basis.

The legitimating route of the federal model, direct elections to a parliamentary chamber on the European level, was considered a possibility at least in the natal

³⁰⁰ Treaty establishing the European Coal and Steel Community and Annexes I – III, Paris, 18 April 1951.

hour of the European Union already. These direct elections would have been organised by individual member states. In the end, this option was debated in Italy once, but never implemented in practice. Both options of Article 21 (1) ECSC constitute a member states centred approach, and are reminiscent of the ECSC as an international organisation.

The mere fact that the Treaty of Paris, which created the European Coal and Steel Community, included a Common Assembly in its institutional framework, is worth attention. The six founding member states could have moved forward without a parliamentary chamber. However, setting up the ECSC against the background of the cold war without a parliamentary assembly would have been considered as undemocratic in the western sense of liberal parliamentary democracy. The model of parliamentary democracy, originally developed in the context of the nation state, was copied and elevated to the European level. The legitimating capacity of parliaments, with regards to European integration a central theme of the federal model, had found its way into the institutional structure of the ECSC.

A federal impetus can be observed in the early Assembly's behaviour: underlining its wish to be directly elected, and struggling to be recognised as an equal partner in lawmaking by member states, rather than just considered as a consulting body. In the Assembly's 1954 Teitgen Report, originally concerned with the Assembly's competences and their exercise and adopted unanimously by the Political Affairs Committee in charge, Rapporteur Teitgen underlined that it would 'contribute in great measure to an increase of the Community's esteem, political standing and

efficacy if Assembly Members were directly elected by universal suffrage'.³⁰¹ Teitgen called upon the Common Assembly's presidium to set up a working group on the matter of direct elections by universal suffrage.³⁰² The unanimous vote shows how strong the federal model used to be in the chamber at that time. The matter of direct elections was picked up in the run-up to the Treaties of Rome.

Despite the Assembly showed its affinity to the federal model from its formation in Strasbourg onwards, the different models of the EU cannot always be limited to single actors. As Hand, van den Berghe and Bieber give account, when the Conference of Ministers of Foreign Affairs of the Member States of the European Coal and Steel Community discussed the matter of designation of Assembly deputies in early 1957, the Italian representative Martino suggested that these members should be directly elected.³⁰³ Mr. G. Martino affirmed the need to elect Assembly members directly to achieve European political unification.³⁰⁴ He therefore did away with the choice of delegating AMs entailed in the above mentioned Article 21 (1) ECSC. Martino later became President of the European Parliament from 1962 to 1964. The Italian proposal contained two options:

- a wider version by which the Assembly was to consist of delegates elected by direct universal suffrage in accordance with the procedure laid down in

³⁰¹ Political Affairs Committee, Rapporteur P.-H. Teitgen, *Teitgen Report*, ECSC Common Assembly Document No. 5 1954/1955, at p 19, subparagraph 20, translation from German by the author.

³⁰² Teitgen Report, *op.cit.*, p 22.

³⁰³ Hand, van den Berghe, Bieber, "What is a 'Uniform Procedure'", in Sasse, Brew, Georgel, Hand, Huber and van den Berghe, *The European Parliament: Towards a Uniform Procedure for Direct Elections* (The European University Institute, Florence: Badia Fiesolana 1981), p 9.

³⁰⁴ Hand, van den Berghe, Bieber, *op.cit.*, p 9.

each member state. Such a move towards direct elections was considered premature by other Foreign Ministers;

- and a more narrow version putting the burden on the Assembly itself to draw up proposals for electing its members by direct universal suffrage with the Council, acting unanimously, laying down the appropriate provisions, which it should recommend to the Member States for adoption.³⁰⁵

Direct elections to the assembly were considered a necessary step on the way to European political unification by the Italian government. Remarkably enough, only the proposal for postponed direct elections contained the designation ‘in accordance with a uniform procedure in all Member States’, whereas the proposition for immediate direct elections suggested electoral systems as ‘laid down by each Member State’.³⁰⁶ During discussions, emphasis was put by Ministers on codifying the possibility of direct elections of AMs and not on uniformity of the electoral system. The dilemma faced by the Assembly was equally shared by national governments.

By agreeing on the downscaled version of the Italian proposal, however, Member States gained more time until the vision of direct elections to the European chamber could become a reality. Whereas Italy was ready to offer direct elections to the Assembly, that position was not held unconditionally by other Member States, revealing a more intergovernmental approach. On the other hand, the

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

Assembly did gain the right of initiative to draw up an electoral system for direct elections.

As a result, Article 138 (3) of the 1957 EEC Treaty reads that

‘1. The Assembly shall consist of delegates who shall be designated by the respective Parliament from among their members in accordance with the procedure laid down by each Member State.

2. The number of these delegates shall be as follows:

Belgium.....	14
Germany.....	36
France.....	36
Italy.....	36
Luxembourg.....	6
Netherlands.....	14

3. The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.

The Council shall, acting unanimously, lay down the provisions, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements’.³⁰⁷

³⁰⁷ Treaty establishing the European Economic Community, Rome, 25 March 1957.

All three models are reflected in this phase: delegated Assembly Members correspond to a supranational, technocratic model and policy outputs as the central legitimating mechanisms. The designation of AMs and a reluctance of member states to have a directly elected Assembly reflect national governments' perceptions of the EEC as an international organisation. Whereas the ECSC Treaty already contained the option for member states to directly elect Assembly Members, the EEC provided for elections by universal suffrage in accordance with a uniform procedure, and, therefore, elections by direct universal suffrage at a later stage. Member states, central legitimating elements of the international organisation model, retained the final decision on the conduct of direct elections. On the one hand, the matter of a uniform electoral procedure was pushed off to the Assembly, on the other, the Assembly received a mandate for a uniform electoral procedure. The aim of political unification and a directly elected chamber as the central legitimating mechanism provide evidence for the federal model. The early phase positions the Assembly clearly as the protagonist of the federal model. However, as can be seen from the Italian position, political unification was considered a goal of European integration among governments as well, although that position was by no means unconditionally held among member states' governments. The period of time towards direct elections quite clearly defines the opposing sides of Parliament, pursuing a federal model, on the one side, and member states, following the model of an international organisation, on the other.

The Assembly pursued its objective of direct elections via a uniform electoral procedure during the following two decades in various Reports,³⁰⁸ but without success. Parliaments Reports were not disregarded due to their merits, but, as Rapporteur Georgios Anastassopoulos has put it in his Report in 1998, the matter of direct elections of Assembly Members itself did not find unanimous consent by Member States, largely because it was considered inopportune by General de Gaulle.³⁰⁹ Member States, as became evident in the Empty Chair crisis of 1965, were increasingly trying to put the integration process on hold. As unanimous support of member states was required to continue towards direct elections, a single member state emphasising an intergovernmental approach could block any progress in that direction.

Without going into too much detail of the early Reports, I shall visit them only in so far as they provide information on approaches to the democratic deficit in particular under the federal model. On the road to direct elections by universal suffrage, a working party within the Committee on Political and Institutional Affairs started working on the election of the European Parliamentary Assembly by direct universal suffrage in March 1958 and thereby made use of its right of initiative under Art. 138 (3) EEC. It was headed by Prof. F. Dehousse, a Belgian Senator of the Socialist group. Further proponent members of the working party

³⁰⁸ Committee for Political Affairs and External Relations, Rapporteur P.-H. Teitgen, *Teitgen Report*, ECSC Common Assembly Document No. 5 1954/1955; Teitgen Report and Résolution de l'Assemblée Commune, adoptée le 2 décembre 1954 relative aux pouvoirs de l'Assemblée Commune et à leur exercice, ECSC OJ of 11.12.1954; Dehousse Report, OJ 37, 2.6.1960, Convention on the direct Election of the European Parliamentary Assembly by universal suffrage; Vedel Report, *Report of the Working Party examining the Problem of the Enlargement of the Powers of the European Parliament*, Bulletin of the European Communities, Brussels, Supplement No. 4/72.

³⁰⁹ Georgios Anastassopoulos, *Report on a Proposal for an Electoral Procedure incorporating Common Principles for the Election of Members of the European Parliament*, Anastassopoulos Report, Committee on Institutional Affairs, 2 June 1998, A4-0212/98, p 9.

included Mr. Maurice Faure, French Under-Secretary of State for Foreign Affairs, and the above mentioned Mr. Gaetano Martino. Both had participated in the negotiations of the Rome Treaty and had signed the Treaties as members of the Working Party.³¹⁰ The illustrious composition of the working party indicates the importance ascribed to the matter of direct elections by the European parliamentary assembly. A major task for the Assembly was the obstacle to reconcile the federal model of the Assembly with the predominant model among member states of an international organisation. That was particularly problematic as the Treaty demanded a uniform procedure in all member states.

Mr. Dehousse outlined a cautious approach that would be acceptable to the six national governments as well as the six national parliaments.³¹¹ Because ratification required assent not only of the six member states' governments, but of national parliaments as well, a generous reading of Article 138 (3) EEC was required. The working party interpreted the 'uniform procedure' as not to be synonymous with identity, despite understanding it as an electoral law that was basically the same in all states.³¹² At the time, the view was taken in the Convention that a certain minimum of common principles in the draft proposal would suffice to call it a uniform procedure.³¹³ The Convention was adopted, again with unanimity, on 17 May 1960.³¹⁴ Whereas Article 4 of the Dehousse Convention provided for a transitional period, Article 9 allowed member states to use their national system as long as they complied with the Convention and left

³¹⁰ Hand, van den Berghe, Bieber, *op.cit.*, p 10.

³¹¹ *ibid.*

³¹² Dehousse Report, OJ 37, 2.6.1960, Convention on the direct Election of the European Parliamentary Assembly by universal suffrage, the Rapporteurs being Mr Battista, Mr Dehousse, Mr Faure, Mr Schuijt and Mr Metzger, pp 834, 835.

³¹³ Dehousse Report, *op.cit.*, pp 834, 835.

³¹⁴ Dehousse Report, *ibid.*

the directly elected Assembly the task to draft a uniform system for following elections. The divide between national systems and a European system, between common provisions or principles on the one side and a uniform system on the other, was to become an underlining theme in all reform attempts to come. Whereas a uniform system represented the approach under the federal model, the deployment of national provisions underlined the intergovernmental approach. Despite a unanimous vote on the Dehousse Convention in the Parliamentary Assembly, the difficulty of a ratification of Treaty amendments in all member states urged the Assembly to caution. Out of this necessity followed the call of the Convention for a two-step approach: to be directly elected first, by national provisions, and drafting a more uniform system afterwards. Albeit continued strong support for the Convention in the chamber, Council failed to act. The matter was picked up in the form of the Vedel Report.

Following a meeting of heads of government in The Hague, a working party under the chairmanship of Mr Dean Georges Vedel issued an extensive Report examining the problem of the enlargement of the powers of the European Parliament in 1972.³¹⁵ The Vedel Report analysed the tasks awaiting the Communities, and included matters such as economic and monetary Union, environmental policy and political Union, which have been put on the agenda and made a priority at the intergovernmental conference in The Hague in 1969.³¹⁶ In the Report, Parliament's legal role as a consultative body as well as its political

³¹⁵ Vedel Report, *Report of the Working Party examining the Problem of the Enlargement of the Powers of the European Parliament*, Bulletin of the European Communities, Brussels, Supplement No. 4/72.

³¹⁶ Vedel Report, *op.cit.*, p 20.

role had been examined. The working group took a dim view of the chamber's standing:

‘[...] if Parliament is representative, it also works in a vacuum. Its debates - and other work and the tensions which arise and which bear witness to its nature as a political institution, have almost no impact on the press, public opinion and the life of the political parties. The Parliament thus falls far short of fulfilling its normal tasks of expressing and shaping political opinion. This state of affairs can be explained basically by its limited powers.’³¹⁷

In the Report, it becomes evident that Parliament sees a major reason for its low profile in political life in its limited competences. Parliament should be strengthened in the interest of the construction and government of Europe. In particular, Vedel and his colleagues criticise that ‘the Assembly is something less than that of a parliament and Community decisions acquire democratic legitimacy almost exclusively through national channels’.³¹⁸ As I have outlined in Chapter One, the European Parliament took the development from a largely consultative body to a parliament according to a catalogue of functions in the past decades. Next to an increase of powers, Vedel demanded legitimation of Community decisions by means apart from the member states route. The Vedel Report argued that direct elections would considerably contribute to the Community's democratization and legitimation and promote a closer Union between Europe and its peoples. An electoral scheme would encourage existing parties to take a stand

³¹⁷ Vedel Report, *op.cit.*, p 29.

³¹⁸ Vedel Report, *op.cit.*, p 30.

on Europe rather than on national issues and ‘stimulate the formation of wider units grouping together the various related political parties’.³¹⁹ The working party strongly held that there was no interdependence or order of priority between an increase of powers on the one side and direct elections on the other.³²⁰ In accordance with the Dehousse Report, for a transitional period, direct elections under the system applied in each member states were considered to be in fulfillment of Article 138 (3) EEC. With regards to a uniform electoral system, a split among members of the working party becomes evident. Two members had emphasised the need for drafting a uniform electoral system in the not too distant future to facilitate the formation of political groups at European level.³²¹ The majority of the working party opted to push ahead with direct elections first and leaving the matter of a single system to an elected Parliament, because it was feared that work on such a system would postpone elections by universal suffrage even further. Direct elections continued to be a key priority for the Assembly, competing with a uniform system. The dichotomy which should come first, direct elections by national provisions or a single system, continued in the early seventies. Further refinement of electoral provisions in the Dehousse Report was not attempted in Vedel, but to be picked up in the following years. The difference of opinion on the preference of a uniform system or direct elections foreshadowed the discussion in later parliaments. Whereas proponents from both sides corresponded to the federal model, supporters of direct elections on the basis of provisional national systems assessed the prospects of finding a consensus among member states on a uniform system as low.

³¹⁹ Vedel Report, *op.cit.*, p 61.

³²⁰ Vedel Report, *op.cit.*, p 62.

³²¹ Vedel Report, *ibid.*

In 1973, the European Parliament had nominated the Dutch socialist MEP Schelto Patijn to catch up on the momentum of the Vedel Report, which had urged for direct elections. Along the lines of the federal model acknowledging a democratic deficit, Rapporteur Patijn regarded direct elections as an essential part in the unification of Europe, because citizens would lend a legitimacy to the exercise of power by the Communities which has been lacking so far.³²² Evaluating the role of member states' governments, the Rapporteur regrets that despite the Treaties providing for a direct link between people and Parliament, it has not been possible to convince responsible politicians of this fundamental step.³²³ Parliament issued a new Report on direct elections because the relevance of the 1960 Dehousse Convention had diminished, since the transitional period leading to the establishment of the Communities had ended and three member states had joined the Communities during the first Northern enlargement. By this Report, Parliament intended to provide member states with a new opportunity to give their approval to a modified Convention and 'to strengthen the legitimacy of the European Community and thus smooth the road to European union'.³²⁴

In the meantime, during the 1974 Paris meeting of the heads of government under Valéry Giscard d'Estaing, the Communities' member states decided to proceed with direct elections in or after 1978.³²⁵ The heads of government expected

³²² Rapporteur Schelto Patijn, *Report on behalf of the Political Affairs Committee on the adoption of a Draft Convention introducing elections to the European Parliament by direct universal suffrage*, European Communities Document 368/74, 13 January 1975, Patijn Report, adopted on 14 January 1975, p 11.

Resolution, Draft Convention OJ C 32, 11.2.1975.

³²³ Patijn Report, *op.cit.*, p 11.

³²⁴ *Ibid.*

³²⁵ Paragraph 12 of the Communiqué of the heads of government, Paris, 9-10 December 1974. The UK and Denmark reserved their positions. The decision was confirmed by the European Council in Rome the following December.

Council to act on Parliament's proposals in 1976. Direct elections can be regarded as a quid pro quo for the institutionalisation of summit meetings in the format of the European Council and the perceived strengthening of the intergovernmental side following from this, which was also agreed upon at the 1974 Paris meeting.³²⁶ As described in Chapter One, Parliament had also gained powers under the budgetary treaties in 1970 and 1975, increasing its standing towards Council and thereby giving it a stronger bargaining position.

The Patijn Convention was adopted by the European Parliament in 1975.³²⁷ Parliament suggested to be elected by direct universal suffrage, thereby excluding the possibility of electoral colleges or by delegation, for a term of five years.³²⁸ Under Article 7, Parliament continued its twofold approach:

1. drawing up a uniform electoral system by 1980 the latest, but
2. allowing member states to use national system pending the entry into force of such a uniform system.³²⁹

The Convention

- made sure to preclude any imperative mandate,³³⁰
- contained a list of incompatibilities, which also excluded members of national governments from becoming an MEP but accepted national MPs for the time being,³³¹

³²⁶ Andrew Duff, DRAFT REPORT II, 12.04.2010, 2010/xxxx/(INI), p 30; R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (London: John Harper, 8th edition 2011), p 13.

³²⁷ *Draft Convention on the Election of Members of the European Parliament by Direct Universal Suffrage*, OJ C 32/15, 11.2.1975, Patijn Convention.

³²⁸ Patijn Convention, *op.cit.*, Articles 1 and 3, pp 15, 16.

³²⁹ Patijn Convention, *op.cit.*, Article 7, p 16.

³³⁰ Patijn Convention, *op.cit.*, Article 4.

- attempted to hold elections on the same day, but allowed to hold elections one day before and after that.³³² Therefore, elections would be held over a period of the same three days in the European Community,
- fixed the time of holding elections in the legislature,³³³
- made arrangements to verify the credentials of its members,³³⁴ and
- for the filling of vacancies.³³⁵

The number of seats was considerably reduced in the Resolution in comparison to the Patijn report. However, the Rapporteur attempted to achieve ‘maximum possible proportionality’ between the number of inhabitants of a state and the number of representatives in the European Parliament.³³⁶ In the end, the Convention proposed the following distribution of 355 seats among the nine member states:

Belgium	23
Denmark	17
Germany	71
France	65
Ireland	13
Italy	66
Luxembourg	6
Netherlands	27

³³¹ Patijn Convention, *op.cit.*, Article 5, 6.

³³² Patijn Convention, *op.cit.*, Article 9.

³³³ Patijn Convention, *op.cit.*, Article 10.

³³⁴ Patijn Convention, *op.cit.*, Article 11.

³³⁵ Patijn Convention, *op.cit.*, Article 12.

³³⁶ Patijn Report, *op.cit.*, p 15.

Patijn recognized the obligations of Article 21 (3) ECSC, 108 (3) Euratom and 138 (3) EEC that required the European Parliament to draw up proposals for direct elections in accordance with a uniform procedure, but argued that the Treaties were unspecific in how uniform that system needed to be.³³⁸ If elections were carried out according to the same principles, they could be said to be uniform; these included in particular, next to the provisions of the Convention, the fundamental principles of democratic elections, ‘elections must be equal, free, universal, direct and secret’.³³⁹

The Patijn Convention had put an emphasis on direct elections, deferring the construction of a uniform system, but attempted to put a deadline in place for drafting such a set of rules. A major aim of Parliament was to strengthen the legitimacy of the Communities, in accordance with the federal model. It became evident in the debates around the introduction of direct elections that this federal impetus had to be established against the model of the EU as an international organisation, represented by the member states. The matter of the distribution of seats, already highly contested between Parliament and member states at times of the Patijn Convention, should prove to become a cyclic element. Mr Patijn attempted to cope with this matter by introducing a broadly proportional approach.

³³⁷ Patijn Convention, *op.cit.*, Art. 2.

³³⁸ Patijn Report, *op.cit.*, p 21.

³³⁹ *Ibid.*, based on Article 38 of the *Grundgesetz für die Bundesrepublik Deutschland*.

Council reached agreement on direct elections to the European Parliament in Brussels on 20 September 1976. The laws governing elections are annexed to a decision.³⁴⁰ The 1976 Elections Act has the status of primary law and required ratification by each member state. Council followed the Patijn Report in many respects. The most striking difference to the Patijn Convention's provisions can be found in Article 2 of the Elections Act. Member states did not follow a proportional allocation of seats, but a significantly different distribution. With 410 seats considerably larger, seats were allocated accordingly, ensuring the four biggest member states receive an equal share:

Belgium	24
Denmark	16
Germany	81
France	81
Ireland	15
Italy	81
Luxembourg	6
Netherlands	25
UK	81

National sentiments were too strong in Council to come to a proportional allocation of seats which could have been carried on in the following decades to come. The Act enables direct elections, but takes out the Patijn Convention's deadline of 1980. Leaving the Treaty obligation of a uniform electoral procedure

³⁴⁰ Council Decision 76/787/ECSC, EEC, Euratom, OJ L 278/1, 8.10.1976.

to an indefinite future proved to become a major obstacle for reform attempts of Rapporteurs in the following decades. Not just Parliament was free to choose to pick up the matter of electoral reform, so was Council. Member states had no obligation to act within a certain timeframe following from the Elections Act. What at the time might have looked like a minor change to the election day as foreseen under the Patijn Convention became a further obstacle for all reform attempts: Article 9 Elections Act allowed for a four day period of voting, starting on a Thursday, ending on a Sunday.³⁴¹ National traditions prevailed over proposed provisions of the European Parliament Patijn Convention.

The first direct elections to the European Parliament took place between the 7th and the 10th of June 1979. For organisational reasons, elections were scheduled for May/June 1978, but had to be moved to 1979, after a conciliation procedure was hammered out to work out the details with the European Parliament.

The historic first direct multinational elections to the European Parliament were conducted under different national electoral systems in the nine member states. Moreover, electoral systems used did not always match those in operation for national elections. Corbett *et al.* have compiled a small list of the variances: France used a PR system with one national constituency and a 5 per cent legal threshold instead of the two-round majority system with single-member constituencies which were in use for national elections at that time. Germany used a similar system instead of its personalised proportional system (PPR) used for *Bundestag* elections. Belgium, Italy, Ireland and the UK introduced new constituencies for EP elections that differed from those in use for national

³⁴¹ Article 9 Elections Act, Council Decision 76/787/ECSC, EEC, Euratom, OJ L 278/1, 8.10.1976.

elections. Ireland retained its STV system and the UK kept FPTP. A minor concession by the UK was to allow STV for the MEPs from Northern Ireland. Denmark and Luxembourg again used a very different system for EP elections by choosing PR with a single national constituency, instead of many smaller constituencies. The Netherlands as the single exception proved the rule by choosing PR in a single constituency for both national and European elections.³⁴²

During the first phase from the founding years of the Communities to the first direct elections, the competition of direct elections and a uniform system characterized that period. Whereas both were regarded as essential in the unification of Europe and in the legitimation of power among followers of the federal model, in particular in the Assembly and later on in the European Parliament, the goal of direct elections was pursued first as finding consensus among all member states on a uniform system was deemed as extremely difficult. As the following subsection shall reveal, the distribution of seats among member states and a strong adherence to national electoral systems should present major obstacles to further reform towards a more uniform system. The increasingly bewildering variety of electoral systems added to the difficulty of addressing the democratic deficit via electoral reform under the federal model.

³⁴² R. Corbett, F. Jacobs and M. Shackleton, *op.cit.*, p 15; but visit, for a more detailed collection of electoral system used in the first EP elections Rapporteur Jean Seitlinger, *Report drawn up on behalf of the Political Affairs Committee on a draft uniform electoral procedure for the election of Members of the European Parliament*, Seitlinger Report, European Parliament working documents, document 1-988/81/B-C, 26 February 1982.

1.2 Phase Two: From the first elections to the modification of the Electoral Act

The European Parliament has turned towards implementing the Treaty obligation of a uniform electoral system and attending the democratic deficit since the first direct elections in 1979 and has issued continuous reports on that matter.³⁴³ Immediately after the first set of elections, Parliament started on mapping out a uniform electoral system, confirming its adherence to the federal model. But it was not until two decades later before limited progress on the way the EP is elected was made after the Treaty of Amsterdam and the election of the 1997 Blair government. As Corbett rightfully observes, the initially meant to be provisional rules became increasingly solidified due to new member states joining the EU, bringing new sets of electoral laws with them and thereby adding to the complexity of the situation.³⁴⁴ Next to the highly sensitive issue of the distribution of seats, the use of FPTP in the United Kingdom remained one of the biggest stumbling blocks to electoral reform, and, moreover, a serious problem to the majority situation in the European Parliament. The UK electoral system was not just a national symbol for British sovereignty, but also had a distorting effect on the overall political balance in the chamber.³⁴⁵ Only shortly after the first set of elections, Parliament started work on transforming the 1976 electoral Act into a uniform voting system.

³⁴³ Seitlinger Report, Report drawn up on behalf of the Political Affairs Committee on a draft uniform electoral procedure for the election of Members of the European Parliament, Rapporteur Mr J. Seitlinger, 26 February 1982, P.E. 64.569, European Parliament Working Documents Document 1-988/81/B-C; Resolution adopted on 10 March 1982, OJ C 87/64, 5.4.1982; Bocklet Report, *Report drawn up on behalf of the Political Affairs Committee on a draft uniform electoral procedure for the election of Members of the European Parliament*, Rapporteur Reinhold Bocklet, European Parliament Working Documents, document A 2-1/85, P.E. 94.297; De Gucht Report I, A3-0152/91, 29 May 1991, P.E. 140.107, adopted 10 October 1991; OJ C 280/141, 28.10.1991; De Gucht Report II, OJ C 115, 26.4.1993; Anastassopoulos Report, *Report on a Proposal for an Electoral Procedure Incorporating Common Principles for the Election of Members of the European Parliament*, Rapporteur Georgios Anastassopoulos, A4-0212/98, 2 June 1998; Robles Report A5-212/2002.

³⁴⁴ R. Corbett, F. Jacobs, M. Shackleton, *op.cit.*, p 14.

³⁴⁵ R. Corbett, F. Jacobs, M. Shackleton, *ibid.*

Rapporteur Seitlinger suggested a step-by-step approach.³⁴⁶ The elements of the electoral system, the right to vote, the right to stand for election, vacant seats and election day should be dealt with as the first steps for a proposal of a uniform electoral system to the Council.³⁴⁷ Seitlinger considered two options for electoral reform, trying to reconcile the majority system used in the UK and the different PR systems in the other eight member states. Both options centred on the values of fairness and equality of PR systems. Alternative A proposed a TTD/MMP electoral system similar to the one used in *Bundestag* elections, not on the European level, but on the national scale within each member state.³⁴⁸ This option was considered as inopportune as in such a system the number of seats varies, in contrast to the rigid number of seats fixed in the Treaties and the 1976 Elections Act. There were also concerns in the Political Affairs Committee that such a system might lead to an overrepresentation of smaller member states.³⁴⁹

In Alternative B, the committee opted for multi-member constituencies with allocation of seats by the d'Hondt system. Another key element of Seitlinger's Report was to cater for the use of expat voting.³⁵⁰ He suggested voting rights across the Communities of 18. The electoral period was to be reduced to two days, Sundays and Mondays.³⁵¹

Parliament adopted the Seitlinger Report on 10 March 1982 by 158 votes to 77, with 27 abstentions, two years late from the deadline Parliament inflicted on itself

³⁴⁶ Seitlinger Report, *op.cit.*, p 4.

³⁴⁷ Seitlinger Report, *op.cit.*, p 3.

³⁴⁸ Seitlinger Report, *op.cit.*, p 6.

³⁴⁹ Seitlinger Report, *op.cit.*, p 6.

³⁵⁰ Seitlinger Report, *op.cit.*, p 15.

³⁵¹ Seitlinger Report, *op.cit.*, p 22.

in the Patijn Convention. Strikingly, the Report differs from all previous as well as following Reports by the lack of a certain pathos. Whereas all other Reports, sometime passionately, advertise the merits of reform in federal terms of legitimacy and political unification, this Report deals with the matter of electoral reform in a rather mundane form. On the side of member states, a lack of thrust could evenly be observed. The difficult period of time in the Communities of a standstill and a refusal from the side of the UK government to consider anything else than an FPTP system precluded any consensus among member states in the Council.

After the elections to the European Parliament in 1984, the second legislature of 1984 to 1989 appointed Reinhold Bocklet as Rapporteur. Holding on to a step-by-step approach, Bocklet's Report, under the impression of the denial of votes in European elections to EEC citizens in Gibraltar, dealt prominently with the right to vote and to stand in elections of EEC citizens residing in a member state other than their own,³⁵² and called for the introduction of proportional representation, either using national constituencies and leaving it optional to member states dividing territories up into constituencies, also leaving the use of preferential voting optional.³⁵³ The use of legal thresholds was allowed as long as they did not exceed 5 %.³⁵⁴ No changes were proposed with regards to shortening the period of elections of four days.

³⁵² Reinhold Bocklet, *Report drawn up on behalf of the Political Affairs Committee on a draft uniform electoral procedure for the election of Members of the European Parliament*, Bocklet Report, European Parliament working documents, document A 2-1/85, pp 8, 9.

³⁵³ Bocklet Report, *op.cit.*, pp 9, 10.

³⁵⁴ Bocklet Report, *op.cit.*, p 10.

The Political Affairs Committee adopted the Report by only a weak majority of 16 votes to eight, with 13 abstentions, on 28 February 1985.³⁵⁵ As a result, Parliament's political groups did not welcome the new proposals. The EP therefore did not submit any new text on a uniform electoral procedure to the Council in time for the June 1989 election. Council was under no pressure to consider any new text. In November 1989, the Enlarged Bureau decided to urge political groups of the chamber to pick up the matter of electoral reform. Liberal Intergovernmentalism shone through in this period of time.

The fall of the Berlin Wall in November 1989 and the accession of the territory of the former GDR to the Federal Republic of Germany and the EC in October 1990 brought in its wake a review of the number of MEPs from Germany. The new distribution of seats gave Parliament an opportunity for a fresh start on electoral reform. After the 1989 European Parliament elections in the twelve member states of that time, responsibility was transferred to the Committee on Institutional Affairs. Karel de Gucht became Rapporteur on electoral reform, a Flemish Liberal, who held the office of Belgian Foreign Minister from 2007 to 2009 and is the EU Trade Commissioner in the current Commission.

De Gucht produced two interim Reports and restated, in the style of the Assemblies' early Reports, Parliament's affiliation with the federal model.³⁵⁶ The

³⁵⁵ Bocklet Report, *op.cit.*, p 3.

³⁵⁶ Karel de Gucht, *Interim Report of the Committee on Institutional Affairs on the European Parliament's guidelines for the Draft Uniform Electoral Procedure for Members of the European Parliament*, A3-0152/91, 29 May 1991, De Gucht Report I, and Resolution OJ C 280, 141, 28.10.1991; *Interim Report of the Committee on Institutional Affairs on the European Parliament's guidelines for the Draft Uniform Electoral Procedure for Members of the European Parliament*, 10 March 1993, OJ C 115, 59, 26.4.1993, De Gucht Report II. adopted 10 March 1993 by 207 to 79 with 19 abstentions.

Rapporteur criticised that twelve years after the first elections to the European Parliament, disagreement between governments of member states had made it impossible to achieve the Treaty objective to elect MEPs in accordance with a uniform procedure in all Member States.³⁵⁷ By his Reports, de Gucht tried to seize the initiative and take back control over the matter of the electoral procedure, with a proposal that would find a broad majority among ranks in Parliament.³⁵⁸ As the rationale of his Report, de Gucht named the consolidation of democratic legitimacy of the European Parliament in a ‘phase of achieving political, economic and monetary union in Europe with a view to transforming the Community into an effective federal-style European union’.³⁵⁹ The Rapporteur intended to raise people’s awareness of belonging to a single European society by a step-by-step approach and interpreted the term ‘uniformity’ not as a complete identity of laws, but as a harmonisation of the main elements of the electoral procedure.³⁶⁰

De Gucht called for a distribution of seats according to proportional representation.³⁶¹ Preferential voting would continue to be allowed. Concerned with declining turnouts in European Parliament elections, de Gucht brought up the matter of financing European election campaigns.³⁶² The interim resolution in October 1991 was welcomed by a broad majority in the chamber and adopted on

³⁵⁷ De Gucht Report I, *op.cit.*, p 4.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ De Gucht Report I, Resolution OJ C 280, 141, 142.

³⁶² De Gucht Report I, *op.cit.*, p 6; De Gucht Report I, Resolution OJ C 280, 141, p 143.

10 October 1991 by 150 to 26 with 30 abstentions.³⁶³ Meanwhile, the Maastricht treaty introduced some significant changes to the constitutional framework.

In 1992, the Treaty of Maastricht introduced the concept of European citizenship. Article 8b II of the Maastricht Treaty stated that:

...[E]very citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that state. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a member State.³⁶⁴

The contents later entered Article 18 II ECT and, after the Lisbon Treaty, Article 20 II b) TFEU. The Maastricht Treaty further required a revision of the 1976 Electoral Act due to a redistribution of seats.³⁶⁵

Also, the Maastricht Treaty amended Paragraph 3 of Article 138 ECT to grant Parliament the right of assent to Council's proposal for a uniform electoral procedure, in addition to the right of initiative with regards to electoral reform which the Parliament already had since the beginnings of the integration process:

³⁶³ De Gucht Report I, Resolution OJ C 280, 141.

³⁶⁴ Treaty on European Union, OJ C 191, Title II, Article 8b II.

³⁶⁵ Council Decision 93/81, OJ L 33/15, 9.2.1993.

‘3. The European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States.

The Council shall, acting unanimously *after obtaining the assent of the European Parliament*, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.’³⁶⁶

Moreover, the Maastricht Treaty inserted the new Article 138a ECT on the role of European political parties:

‘Political Parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.’³⁶⁷

This Article is a replica of Art. 21 I. S.1 of the *Grundgesetz für die Bundesrepublik Deutschland*, the German constitution. Granting the right of expat voting to EU citizens, establishing the role of European political parties and giving Parliament the right of assent in the field of electoral reform contribute to remedy the democratic deficit in accordance with the federal model.

³⁶⁶ The Maastricht Treaty, Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, Maastricht, 7 February 1992, (40), Article 138 (3), OJ C 191, 29 July 1992, emphasis added by the author.

³⁶⁷ The Maastricht Treaty, Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, Maastricht, 7 February 1992, (41), Article 138 a.

De Gucht incorporated the changes to the distribution of seats such as the raise to 99 seats for the unified Germany in his Report. As a concession to the UK's FPTP system, he suggested a top-up system single-member constituency FPTP system in the UK during discussions for up to two thirds of seats of that state, the remaining seats would have been distributed in a way to ensure overall proportionality according to the vote of each party. The second De Gucht Report was adopted on 10 March 1993 by 207 to 79 with 19 abstentions.³⁶⁸ However, Council did not act on the proposal in time for the 1994 European Parliament elections. In the de Gucht Report, the federal bias of the early decades of European integration surfaced again. The federal sentiment translated into reform proposals insofar as another attempt for more uniformity, in particular in the form of PR, and also more proportionality in terms of the distribution of seats was taken. With regards to campaigning, de Gucht particularly dealt with the financing of campaigns, but did not propose structural changes to the Elections Act which would have fostered different kinds of campaigns.

A major breakthrough in the following years was to become possible because of two important developments in 1997: The election of a Labour government in the UK, which made electoral reform beyond FPTP possible, and changes to the constitutional framework by the Amsterdam Treaty. The Labour Party and the Liberal Democrats were in support of a PR system with regional constituencies. When the Labour government took office, one of the major stumbling blocks for the next step in electoral reform, the UK's insistence on FPTP, disappeared. During the IGC, which led to the Treaty of Amsterdam, consensus emerged

³⁶⁸ De Gucht Report II, OJ C 115, 59, 26.4.1993, adopted 10 March 1993.

around the idea of a reference in the Treaty to ‘principles common to all member states’. The Amsterdam Treaty - and every Treaty concluded thereafter - includes the following amended Article 190 (4), formerly Article 138 (3):

‘The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform electoral procedure in all Member states *or in accordance with principles common to all Member States.*’³⁶⁹

The matter of common principles enshrines a concept which developed during the last Reports on electoral reform. Although Parliament, which had grown over decades not just in size, but also by complexity and competences, did not adopt its latest Reports unanimously, it still passed Resolutions with convincing majorities in the House. However, Council was more split on these matters. Due to the Treaty requirement of unanimous decisions, no compromise could be reached. The new and more flexible Art. 190 (4) EC provided a new basis for discussion.

Parliament’s Institutional Affairs Committee nominated the chamber’s Vice-President Georgios Anastassopoulos as Rapporteur on electoral reform, who considered the situation to be ‘sufficiently ripe’ to adopt a new electoral system based on common principles.³⁷⁰ In the draft Act of his report, the Rapporteur proposed

³⁶⁹ EC Amsterdam, OJ C 340, 10 November 1997, Article 190 (4), emphasis added by the author.

³⁷⁰ Georgios Anastassopoulos, *Report on a Proposal for an Electoral Procedure Incorporating Common Principles for the Election of Members of the European Parliament*, A4-0212/98, 2 June 1998, Anastassopoulos Report, p 16.

- the introduction of a PR list system,³⁷¹
- making regional constituencies mandatory for member states with a population exceeding 20 million,³⁷²
- allowing for constituencies taking account of ‘specific regional characteristics’ as long as they do not violate the principle of proportional representation,³⁷³
- optional legal thresholds of a maximum of 5% of the votes cast,³⁷⁴
- optional preferential voting,³⁷⁵
- electing 10 per cent of the total number of seats within the European Parliament by list-based PR in a European constituency comprising the territory of the European Union with effect from the 2009 EP elections,³⁷⁶ and
- that the office of MEP shall be incompatible with membership in a national parliament.³⁷⁷

The Rapporteur regarded matters such as voting rights and compulsory voting to go beyond the concept of common principles. Arrangements for the exercise of the right to vote and to stand as candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals had been sufficiently dealt with according to the Report.³⁷⁸

³⁷¹ Anastassopoulos Report, *op.cit.*, Article 1, p 7.

³⁷² Anastassopoulos Report, *op.cit.*, Article 2, p 7.

³⁷³ Anastassopoulos Report, *op.cit.*, Article 4, p 8.

³⁷⁴ Anastassopoulos Report, *op.cit.*, Article 5, p 8.

³⁷⁵ Anastassopoulos Report, *op.cit.*, Article 6, p 8.

³⁷⁶ Anastassopoulos Report, *op.cit.*, Article 7, p 8.

³⁷⁷ Anastassopoulos Report, *op.cit.*, Article 8, p 8.

³⁷⁸ Directive of 6 December 1993, OJ L 329, 30.12.1993, p 34.

Anastassopoulos argued for proportionality to enable the ‘full range the of views within the Member States to be taken into consideration and represented’.³⁷⁹ He held that ‘[u]ntil there is a proper European government in place, operating on the basis of a majority system, and also a European opposition, the proportional system will continue to perform a political function which seems broadly justified at the current stage of European integration’.³⁸⁰ The term majority system is most likely to be understood in terms of the democratic model here and not in terms of electoral systems. Anastassopoulos’ argument is an expression of the fact that the Commission did - and still does - not depend on a constant majority of its own in Parliament. Although the political colour of the President of the Commission PR reflects the majority situation in the chamber today and despite the fact that the Commission as a body can be censored and that political groups in the EP are strongly cohesive, the democratic model of the Union is an extreme case of a consensus democracy. PR systems, however, are capable of producing stable majorities. Rapporteur Anastassopoulos did not have a majoritarian electoral system in mind.

Along the line of the federal model, Anastassopoulos sees Parliament as the ‘democratic pillar’ of the Union because it has the capacity to Europeanise issues.³⁸¹ Therefore, the electoral system would need to mobilise the maximum amount of voters. Abstention from the vote and voting for reasons based in national political arenas instead of the European arena would not have any positive effect on the legitimacy of the Union.

³⁷⁹ Anastassopoulos Report, *op.cit.*, p 17.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

One of his key concepts, next to transnational lists, is the ‘close relationship principle’ with the aim of strengthening the links between the electorate and its representatives. Depending on the member state’s size, he held that the existence of territorial constituencies was essential to establish a direct and effective relationship.³⁸² The element of bringing ‘Europe’ closer to its citizens can be discerned from the Rapporteur’s proposal of making constituencies mandatory. Such a proposal has the advantage of having candidate MEPs closer to their potential electorate. Anastassopoulos tries to counterbalance this element with the introduction of a second element the Rapporteur felt passionately about, the introduction of transnational lists. Electing ten per cent of the EP’s component members would ‘certainly contribute to the emergence of a genuine European political awareness and to the establishment of proper European political parties. It would also give European elections a more European dimension which would be less concerned with national political issues’.³⁸³ The proposal of European lists, although hidden in between the Rapporteur’s proposed amendments to the 1976 Elections Act, has been a core proposal in the Report. It tries to elevate European parliament elections to a European dimension, and has a strong federal pitch. Similar to his predecessor, Anastassopoulos tried to revive the federal undertone of the early days of European integration. The Rapporteur tried to reconcile two elements: a stronger role for European parties, and making constituencies mandatory, adding a European dimension to campaigns and bringing candidates closer to their potential voters. In a very broad sense, Anastassopoulos attempted to add a second tier for ten percent of Parliament’s component members. While at the same time making constituencies mandatory,

³⁸² Anastassopoulos Report, *op.cit.*, p 18.

³⁸³ Anastassopoulos Report, *op.cit.*, p 21.

the Report constituted a first small step in the direction of a TTD system, associated with the federal model.

Council, however, did not adopt the proposed amendments of transnational lists and making regional constituencies mandatory. The intergovernmental institution representing member states' interests did not allow for more of a European democracy. Nevertheless, the general rule of proportional representation, optional preferential voting and optional regional constituencies made it into the Electoral Act. Elections to the European Parliament proceed on the basis of the 1976 Act as amended in 1993 and 2002.³⁸⁴

The Treaty obligation of uniformity has been adapted to common principles, incorporating approaches of past reform attempts. Proportionality on member states' level has become the general rule in this member state based system. Attempts to introduce competition to EP campaigns have faltered on the resistance of member states, who saw their role as legitimating mechanisms under the international organisation model under threat from the European Parliament. European Parliament elections continue on the variety of member states' systems. The following Section 2 shall provide some further insights into the democratic deficit by exploring the current system of electoral laws in elections to the European Parliament.

³⁸⁴ Council Decision 76/787 ECSC, EEC, Euratom, OJ L 278 of 8.10.1976, 'Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage' as amended by Decision 93/81/Euratom, ECSC, EEC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, OJ L 33, 9.2.1993, and the Council Decision of 25 June and 23 September 2002 2002/772/EC OJ L 283, 21.10.2002, modifying the original Act.

2. The Law as It Stands: European Parliament Elections and the Current Universe of Electoral Systems

The Assembly and the European Parliament have had a mandate to draft a uniform electoral system since 1957, but today's electoral systems are still based on member states' systems. Despite an interim trend towards harmonisation, there is still no uniform electoral system. While one can speak broadly of Europe-wide elections, there are significant variations in the way in which these elections are conducted across the member states. Only a few common principles exist, such as the use of some kind of a PR system. Due to the complexity and amount of different systems in use, I have decided to present major differences between national systems in the format of a table. When putting this chart together, the author developed even further a deep understanding for bewildered considerations of the variety of current systems among both actors as well as scholars of European elections. The European Parliament's website as well as major publications have shown divergences from the current state more than once. Due to the complexity resulting from having a different system in each member state, and as in the case of the UK actually two different systems, hardly any account which is free of mistakes exists, even among major publications. However, the author attempts to provide an overview in so far as to make the argument that causes for the democratic deficit under the federal model of the EU can be found in the legal bases for the conduct of EP elections, in the different national electoral systems.

The trade-off, having direct elections first and attending the matter of a uniform system at a later stage, has been analysed in the previous section. Ahead of the

first EP elections in 1979, the European Parliament conducted a survey of the nine different electoral systems in use for national parliamentary elections to summarise and compare the electoral laws.³⁸⁵ Although it was too early at the time to evaluate whether greater uniformity could be achieved, it became evident in 1977 that member states' electoral laws would deviate from systems in use for national elections in several respects.³⁸⁶ For example, member states with the intention of retaining a constituency based system for EP elections needed to draw fewer and therefore larger constituencies. At the same time, it became clear that member states would adhere to the principles of their national systems.³⁸⁷ Member states, following the international organisation model of the EU, considered a more uniform system less of a priority and as a danger to their standing in providing legitimacy.

Some Member States used a similar electoral system as in national parliamentary elections, for example the UK stuck to FPTP. The Federal Republic of Germany introduced a hybrid system of PR, with rigid party lists either at regional *Länder* level or at federal level. France, however, was the only EC member state to introduce an entirely new electoral system for the first direct EP elections and used a proportional system with one national constituency and a five per cent legal threshold instead of its two-ballot majority system for national elections.³⁸⁸

In the past seven sets of elections to the European Parliament, several member

³⁸⁵ European Parliament, Directorate General for Research and Documentation, *Electoral Laws of Parliaments of the Member States of the European Communities*, August 1977, PE 50.159.

³⁸⁶ European Parliament, Directorate General for Research and Documentation, *Electoral Laws of Parliaments of the Member States of the European Communities*, August 1977, PE 50.159, p I.

³⁸⁷ *Ibid.*

³⁸⁸ Christian H. Huber, "Approaches to European Elections", in Sasse, Brew, Georgel, Hand, Huber and van den Berghe, *The European Parliament: Towards a Uniform Procedure for Direct Elections* (The European University Institute, Florence: Badia Fiesolana 1981), pp 83-180, pp 117, 118.

states frequently changed their respective electoral systems, for example Belgium, France and the UK.

The 2004 elections were the first in which common principles of the Anastassopoulos Report applied to all member states, and this remained the case for the 2009 European Parliament elections.³⁸⁹ Although a certain degree of convergence of the electoral laws for European elections in the member states can be observed, there still remain considerable differences between them. There are 28 different systems in operation in 27 member states – the UK having a different system for Northern Ireland. The manifoldness of the current systems in use has led the European Parliament to produce a study on existing procedures in the EU.³⁹⁰ Nohlen named it a ‘polymorphic system’, comprised of provisions at national and EU level.³⁹¹

All national systems used since the 2004 elections were proportional on the national level. 15 member states have opted for different varieties of the d’Hondt method for counting votes and allocating seats,³⁹² Germany for Sainte-Laguë/Schepers, Latvia and Sweden for a modified Sainte-Laguë method, Luxembourg for Hagenbach/Bischoff, a variant of Droop/d’Hondt, Italy uses the method of whole quotients and highest remainders, Ireland, Malta and Northern

³⁸⁹ Legal bases: Council Decision 2002/772/EC, EURATOM of 25 June and 23 September 2002 amending the Act concerning the election the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, EURATOM, [2002] OJ L 283, 21 October 2002.

³⁹⁰ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *The European Elections: EU Legislation, National Provisions and Civic Participation* (Brussels: European Parliament, March 2009).

³⁹¹ Dieter Nohlen, “Wie wählt Europa? Das polymorphe Wahlsystem zum Europäischen Parlament“, *Aus Politik und Zeitgeschichte*, B17/2004, pp 29-37.

³⁹² Austria, Belgium, Denmark, Romania, Spain, Finland, France, the Netherlands, the UK, Estonia, Poland, Slovenia, the Czech Republic, Hungary and Portugal.

Ireland operate the STV system. Greece uses a system of ‘pure PR’, Slovakia and Cyprus a system based on the Droop method and the highest remainder, Lithuania, the Hare system combined with the highest remainder.³⁹³

Nine Member States’ electoral laws provide for simple “closed” party lists, whose order cannot be changed by the voter,³⁹⁴ while 14 others provide for preferential voting in semi-open lists in which the order of candidates on a list can be modified by the voter.³⁹⁵ In a couple of states, voters can even choose individual candidates from different parties. Ireland, Malta, Luxembourg and Northern Ireland provide for open lists. In Luxembourg, voters have as many votes as there are mandates, six votes. Votes can be distributed among different lists, so it is a method of panachage or cross-voting. In the other three states, voters list candidates in an order of preference.³⁹⁶

Most member states use one constituency formed of the territory of the state. Belgium, France, Ireland and the UK have divided territories into regional constituencies. Constituencies which are rather administrative units or of interest with regards to distributing seats from party lists can be found in Belgium,

³⁹³ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *The European Elections: EU Legislation, National Provisions and Civic Participation* (Brussels: European Parliament, March 2009), p 16.

³⁹⁴ Germany, Spain, France, Greece, Portugal, the United Kingdom, Estonia, Poland and Hungary.

³⁹⁵ Austria, Belgium, Denmark, Finland, Italy, Luxembourg, the Netherlands, Sweden, Lithuania, Latvia, Slovakia, Slovenia, Czech Republic and Cyprus.

³⁹⁶ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *The European Elections: EU Legislation, National Provisions and Civic Participation* (Brussels: European Parliament, March 2009), p 16.

in the hybrid system of Germany for the conservative party of the CDU/CSU, and in Italy, Poland and the Netherlands.³⁹⁷

The election day itself differs among member states. Some member states traditionally go to the polls on Sundays, while others favour Saturday or mid-week voting. The elections are held on a Thursday in Britain and the Netherlands, on Friday in the Czech Republic and Ireland, on Saturdays in the Czech Republic (two days of voting), Italy, Latvia and Malta, and on Sundays elsewhere.

There is considerable difference with regards to the use and height of thresholds. In some member states there are de jure electoral thresholds below which no seats can be won, in others, there are not. Thresholds vary from 1.8 per cent in Cyprus to a maximum of five per cent. The following table shall be of help in visualising differences in four aspects of the way elections are conducted in the respective member states, constituencies, preferential voting, voting day and legal threshold.

³⁹⁷ OSCE, Office for Democratic Institutions and Human Rights, *Elections to the European Parliament 4-7 June 2009 – OSCE/ODIHR Expert Group Report*, 11-30 May 2009 (Warsaw: 22 September 2009), pp 14, 15.

Current Electoral Systems of Member States in use for European Parliament Elections³⁹⁸

EU	Constituency	Preferential voting for individuals	Voting day	Legal threshold
Belgium	Regional	Yes, within list	Sunday	-
Luxemburg	National	Yes	Sunday	-
Malta	National	Yes, STV	Saturday	-
Italy	Regional	Yes, within list	Saturday & Sunday	4.0%
Cyprus	National	Yes, within list	Saturday	-
Greece	National	No	Sunday	3.0 %
Ireland	Regional	Yes, STV	Friday	-
Lithuania	National	Yes, within list	Sunday	5.0 %
Denmark	National	Yes, within list	Sunday	-
Spain	National	No	Sunday	-
Germany	National	No	Sunday	5.0 %
France	Regional	No	Sunday	5.0 %, Constituency level

³⁹⁸ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The European Elections: EU Legislation, National Provisions and Civic Participation* (Brussels: European Parliament, March 2009), pp 87, 88; and various other official sources; OSCE, Office for Democratic Institutions and Human Rights, *Elections to the European Parliament 4-7 June 2009 – OSCE/ODIHR Expert Group Report*, 11-30 May 2009 (Warsaw: 22 September 2009), pp 14, 15; Andrew Duff, REPORT IV/I (First official Report), 28.04.2011, A7-0176/2011, pp 58-63; Andreas M. Wüst and Markus Tausendpfund, "30 Jahre Europawahlen", pp 3-9, *Aus Politik und Zeitgeschichte*, Vol. 23, 2009, p 5; Philip Stöver and Andreas M. Wüst, "Electoral System", in Yves Déloye and Michael Bruter (eds), *Encyclopaedia of European Elections* (Houndmills: Palgrave Macmillan 2007), pp 109-114, pp 110, 111; Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (London: John Harper Publishing, 8th edition 2011), pp 17, 18.

Austria	National	Yes, within list	Sunday	4.0 %
Latvia	National	Yes, within list	Saturday	5.0 %
Finland	National	Yes, within list	Sunday	-
Netherlands	National	Yes, within list	Thursday	-
Portugal	National	No	Sunday	-
UK - GB	Regional	No	Thursday	-
UK - NI	1	Yes, STV	Thursday	-
Hungary	National	No	Sunday	5.0 %
Sweden	National	Yes, within list	Sunday	4.0 %
Czech Republic	National	Yes, within list	Friday & Saturday	5.0 %
Slovenia	National	Yes, within list	Sunday	-
Estonia	National	No	Sunday	-
Poland	Regional	No	Sunday	5.0 %
Slovakia	National	Yes, within list	Saturday	5.0 %
Romania	National	No	Sunday	-
Bulgaria	National	Yes, within list	Sunday	-

Electoral systems are based in the member states, the national arena is the determining context. I shall analyse the implications for the democratic deficit of the federal model more closely in the next Section 3.

3. How “European” are European Parliament elections? Electoral Systems and Electoral Behaviour in the EU

In this final Section of Chapter Three, I shall analyse the mechanical and psychological effects of the current system of electoral laws in European

Parliament elections. How does the member state based system of differing national electoral systems affect electoral behaviour of parties and voters? I have discerned a lack of competition as one of the reasons for the existence of the democratic deficit under the federal model. To what degree does competition among parties happen in European Parliament elections and does the study of electoral behaviour provide evidence that competition of European political parties on European matters can have an effect on electorates? I shall evaluate electoral behaviour with the help of the Second-Order National Elections model, the electoral cycle model, and the ‘Europe matters’ model. This Section revisits the matter of the democratic deficit and provides evidence that European elections can provide legitimacy according to the federal model if the electoral system is amended to generate competition between European parties on European matters.

To mention a few functions of elections in the terms of Nohlen, do European Parliament elections fulfil the role of legitimising the political system by connecting voter’s preferences with political institutions, by mobilising the electorate for political programmes and parties and sensitising citizens for political problems by explaining alternatives, and bringing about a contest for political power on the basis of alternative political programmes?³⁹⁹ Or, as Franklin and van der Eijk put it, ‘can the political verdict of the electorates be construed as emanating from the political preferences of voters, preferences that are relevant to the decision-making arena concerned?’⁴⁰⁰ Only then, elections can legitimate power and policies which may be devised with this power, exert electoral control

³⁹⁹ D. Nohlen, *op.cit.*, p 35.

⁴⁰⁰ M. Franklin, C. van der Eijk and M. Marsh, *op.cit.*, p 6.

by holding officeholders accountable, and represent groups of citizens and their interests in the political process.⁴⁰¹

To be able to present and analyse the most up-to-date account in the field of European elections, I use sources such as results of the PIREDEU project. The project of ‘Providing an Infrastructure for Research on Electoral Democracy in the European Union’ (PIREDEU),⁴⁰² which developed out of the European Elections Studies (EES) that have been conducted since 1979,⁴⁰³ has focused on campaign and electoral behaviour in all 27 member states, covering the wide field of representation and the connections between voters, candidates, parties and policies, including surveys of citizens and candidates, party manifestos and media content. PIREDEU has examined the functioning of electoral democracy in the European Union after 30 years of direct elections to the European Parliament by analysing what has been called ‘the most ambitious data collection effort on European Parliament elections to date’.⁴⁰⁴ Next to the PIREDEU project’s findings, I draw on prominent sources on the study of electoral behaviour in EP elections that have been made public both in recent times as well as in the conduct of elections over the past three decades. For example, the OSCE/ODIHR has for the first time in history sent an expert group to monitor campaigns and the conduct of European Parliament elections in 2009. The expert group’s Report has proven as very useful in the analysis of this Section. Moreover, I have also attended PIREDEU’s final user community conference in Brussels held in parallel

⁴⁰¹ *Ibid.*

⁴⁰² PIREDEU, URL <http://www.piredeu.eu/>, on web 27 November 2012.

⁴⁰³ EES, URL <http://www.ees-homepage.net/>, on web 27 November 2012.

⁴⁰⁴ Sara B. Hobolt and Mark N. Franklin, “Introduction: Electoral Democracy in the European Union”, (2011) Vol. 30, *Electoral Studies*, pp 1-3, p 1.

with the annual dissemination conference of the European Union Democracy Observatory in 2010.

In 2009 European Parliament elections have been conducted for the first time in all 27 member states. As I have pointed out in the previous Section, one election to the EP takes place on the basis of 28 different electoral systems. European Parliament elections are marked by low-key campaigns of political parties, sparse media coverage and low and declining turnouts. The first set of elections in the nine member states of the time revealed significantly lower turnouts in all member states than in national elections.⁴⁰⁵ From the first elections in 1979 onwards, average turnouts continually declined from nearly 62 per cent to 43 percent in 2009.⁴⁰⁶ By a closer look, the figures reveal a more diverse picture, without contradicting the overall trend: when comparing turnout rates of the 2009 elections with those of the previous 2004 elections, turnout stayed approximately the same in seven member states, it fell in eleven and increased in nine member states.⁴⁰⁷ Turnouts among member states also vary to a great extent, for example in 2009 from over 90 per cent in Luxembourg and Belgium to participation rates as low as around 20 per cent in Slovakia and Lithuania. In general, turnouts are still significantly lower in EP elections than in national elections.

⁴⁰⁵ URL [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html), on web 30 November 2012.

⁴⁰⁶ URL [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html), on web 30 November 2012.

⁴⁰⁷ First group: Belgium, Czech Republic, Germany, Ireland, Luxembourg, Slovenia and Spain; second group (decrease): France, Italy, The Netherlands, United Kingdom, Greece, Portugal, Cyprus, Lithuania, Hungary, Malta and Romania; third group (increase): Austria, Bulgaria, Denmark, Estonia, Finland, Latvia, Poland, Slovakia, and Sweden.

Compulsory voting serves as an important indicator for higher turnouts, however, whereas Belgium and Luxembourg have turnouts above 90 per cent, Greece and Cyprus are not enforcing a penalty for non-voting and show turnout rates below 60 per cent. In the course of EU enlargement, the share of member states with compulsory voting has declined considerably. Cyprus is the only member state with compulsory voting that joined after 1979, and penalties are not enforced, minimising the effect of higher turnouts in Belgium and Luxembourg.

The first elections to the European Parliament in the respective member states usually show higher turnout rates than following elections. The higher levels of attention of the first vote cannot be maintained in subsequent elections.⁴⁰⁸ Simultaneous or imminent upcoming national elections and regional elections make a significant difference for participation rates as well. Whereas turnouts fall after national elections with their lowest point at midterm, they rise again with the next upcoming governmental election and are at their highest if they coincide on the same date with national or regional elections.⁴⁰⁹

In the aftermath of the first elections to the European Parliament by direct universal suffrage, Karlhein Reif and Hermann Schmitt developed their Second-Order National Elections Model (SONE) to explain electoral behaviour in European elections. As it is such a groundbreaking model that all models explaining elections to the European Parliament draw on, either by confirming, refining or invalidating it, I shall first explain the Second-Order National

⁴⁰⁸ Mark Franklin, "European elections and the European voter", pp 227-246, in Jeremy Richardson (ed) *European Union - Power and policy-making* (Milton Park: Routledge 2006), p 23.

⁴⁰⁹ Andreas M. Wüst and Markus Tausendpfund, "30 Jahre Europawahlen", pp 3-9, *Aus Politik und Zeitgeschichte*, Vol. 23, 2009, p 7.

Elections Model in a bit more detail, before assessing and validating further analyses of electoral behaviour in the forms of the electoral cycle model, a refinement of the SONE model, and the ‘Europe matters’ model.

3.1 Second-Order National Elections Model (SONE)

The SONE theory has been called the ‘most influential model to interpret voting behaviour in EP elections’.⁴¹⁰ In response to the first direct elections to the European Parliament in the then nine Member States in 1979, Reif and Schmitt developed their seminal Second-Order National Elections Theory.⁴¹¹ The SONE theory argues that elections to the European Parliament should be treated as a set of ‘simultaneous national second-order elections’.⁴¹²

Reif and Schmitt regard the national arena as the determinant context for these elections. In second-order elections, in comparison to first order elections, there is less at stake.⁴¹³ Whereas national parliamentary elections in parliamentary systems and presidential elections in presidential systems constitute first-order elections, all other forms of elections, such as municipal and regional or state elections, are second-order elections.⁴¹⁴ Side-effects of second-order electoral outcomes can have implications for the first-order arena. For example, many

⁴¹⁰ Catherine E. de Vries, Wouter van der Brug, Marcel H. van Egmond and Cees van der Eijk, “Individual and Contextual variation in EU issue voting: The Role of Political Information”, (2011) Vol. 30, *Electoral Studies*, pp 16-28, p 17.

⁴¹¹ K. Reif and H. Schmitt, “Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results“, (1980) Vol.8, No.1, *European Journal of Political Research*, pp 3-45; K. Reif, *Ten European Elections: Campaigns and Results of the 1979/81 First Direct Elections to the European Parliament* (Aldershot: Gower Publishing 1985); “National Elections Cycles and European Elections, 1979 and 1984”, (1984) Vol.3, No.3, *Electoral Studies*, pp 244-255;

⁴¹² K. Reif and H. Schmitt, “Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results“, (1980) Vol.8, No.1, *European Journal of Political Research*, pp 3-45, p 3.

⁴¹³ K. Reif and H. Schmitt (1980), *op.cit.*, p 9.

⁴¹⁴ K. Reif and H. Schmitt (1980), *op.cit.*, p 8.

voters do not make their choice according to the decision-making arena concerned in the second-order election, but base their vote on matters related to the first-order arena; political parties campaign on matters related to the national main arena instead of focussing on campaign themes that are specific to the second-order arena.⁴¹⁵

In Reif and Schmitt's terms, the characteristic feature of second-order elections is that 'there is less at stake'.⁴¹⁶ As a consequence, electoral results need to be interpreted in the light of the respective electoral arena. In a second-order election, the following elements can be expected according to this model:

- A lower level of participation: fewer voters turn out to vote because less is at stake. Low key campaigns of political parties and a scanty media coverage lead to a low awareness among the electorate of the election itself;
- brighter prospects for small and new political parties: many voters use second-order elections as a test site, with less restraint to choose parties they would not vote for in a first-order arena;
- more invalidated ballot papers due to a frustration over the supply side with regards to party programmes and candidate choice;
- incumbent national government parties loose, the approval rates of national governmental parties rise just after the elections and continue to fall to an all time low until about the middle of the legislature. From this point in time onwards, support for governmental parties will increase with

⁴¹⁵ K. Reif and H. Schmitt (1980), *op.cit.*, p 9.

⁴¹⁶ K. Reif and H. Schmitt (1980), *ibid.*

the nearing of election day. Closer to that day, opinion polls will realistically reflect the electoral prospects of those parties.⁴¹⁷

The SONE model has its roots in Congressional elections in the United States.⁴¹⁸ Mid-term elections to the US Congress take place two years after presidential elections. For more than a century, two characteristics have been confirmed in mid-term elections as compared to presidential elections. Turnout was lower, as was the President's political party share.⁴¹⁹

There are similarities between European Parliament elections and US midterm elections, local and regional elections. The SONE model predicts the following three effects in EP elections:

- Lower turnouts in European Parliament elections than in national elections;⁴²⁰
- Losses for large parties and better electoral prospects for smaller parties compared to national elections;⁴²¹
- National government coalition parties lose to opposition parties.⁴²²

⁴¹⁷ K. Reif and H. Schmitt (1980), *op.cit.*, pp 9, 10.

⁴¹⁸ E.R. Tufte, "Determinants of the outcomes of midterm Congressional elections", (1975) Vol. 69, No. 3 *American Political Science Review*, pp 812-826.

⁴¹⁹ K. Reif, "Ten Second-Order National Elections", pp 1-36, in K. Reif (ed.) *Ten European Elections: Campaigns and Results of the 1979/81 First Direct Elections to the European Parliament* (Aldershot: Gower Publishing 1985), p 9.

⁴²⁰ K. Reif and H. Schmitt (1980), *op.cit.*, pp 15, 16; (1985), *op.cit.*, p 9.

⁴²¹ K. Reif and H. Schmitt (1980), *op.cit.*, p 17; (1985), *op.cit.*, p 9.

⁴²² K. Reif and H. Schmitt (1980), *op.cit.*, p 16; (1985), *op.cit.*, p 9.

How strongly these effects turn out depends on the European election in relation to the national election cycle. This refinement can also be named the ‘electoral cycle model’.

3.2 Electoral Cycle Model

In the case of European elections taking place in the middle of a national electoral cycle, governmental parties are carried by low popular support resulting in weak election outcomes. In European elections following shortly on a national election, government parties can expect a higher share of votes, despite a lower turnout, due to a post-election euphoria and a tendency among voters to support the winners. In the opposite case of EP elections taking place in the run-up to national elections, election results can be expected to give a realistic picture of parties’ prospects in the upcoming elections.⁴²³

The hypothesis of an increase in invalid votes did not hold in European Parliament elections due to a wider spectrum of parties to choose from. Higher vote shares for protest parties rendered electoral protest in the form of invalid ballots superfluous.⁴²⁴

Reif and Schmitt’s model has continued as the predominant model for analysis of European Parliament elections in the last three decades and countless studies have confirmed the SONE model.⁴²⁵ For example, on its mission during the 2009

⁴²³ K. Reif and H. Schmitt (1980), *op.cit.*, p 16, 17 and “National Elections Cycles and European Elections, 1979 and 1984”, (1984) Vol.3, No.3, *Electoral Studies*, pp 244-255.

⁴²⁴ K. Reif and H. Schmitt (1980), *op.cit.*, p 17.

⁴²⁵ “National Elections Cycles and European Elections, 1979 and 1984”, (1984) Vol.3, No.3, *Electoral Studies*, pp 244-255; K. Reif, “Ten Second-Order National Elections”, pp 1-36, in K. Reif (ed) *Ten European Elections: Campaigns and Results of the 1979/81 First Direct Elections to*

European Parliament elections, the OSCE/ODIHR Expert Group Report described the political setting as 27 distinct national political environments, making it difficult to create a sentiment among the electorate that elections are about the EU as a whole and not about defending national interest.⁴²⁶ The democratic deficit of the federal model has its roots in the conduct of 27 different national elections instead of one European election.

The PIREDEU project has resulted in a confirmation of the SONE theory's basic propositions as well as to further refinements of that model. With regards to the matter of low turnouts, Franklin and Hobolt argue that the nature of European Parliament elections level down turnout because they infix habits of abstention.⁴²⁷ In EP elections, they have found that only those parts of the electorate vote who have already acquired the habit of voting. But the low salience of EP elections fails to mobilise new voters who have not acquired the habit of voting yet, and pronounce the long-term implications on electoral participation on European and national levels. European elections not only deny support in acquiring voting habits, but even counteract this process. The second-order nature of EP elections for an apathetic and uninvolved European electorate is to be accused of fostering

the European Parliament (Aldershot: Gower Publishing 1985); Cees van der Eijk and Mark N. Franklin, *Choosing Europe? The European Electorate and National Politics in the Face of the Union* (Ann Arbor: The University of Michigan Press, 1996); M. Marsh, "Testing the second-order model after four European elections", (1998) Vol.28, No.4, *British Journal of Political Science*, pp 591-607; "European Parliament elections and losses by governing parties", pp 51-72, in Wouter van der Brug and Cees van der Eijk (eds), *European Elections & Domestic Politics* (Notre Dame, Indiana: University of Notre Dame Press, 2007); Simon Hix and Michael Marsh, "Punishment or Protest? Understanding European Parliament Elections", (2007) Vol. 69, No. 10, *The Journal of Politics*, pp 495-510; "Second-order effects plus Pan-European political swings: An analysis of European Parliament elections across time", (2011) Vol. 30, *Electoral Studies*, pp 4-15.

⁴²⁶ OSCE, Office for Democratic Institutions and Human Rights, *Elections to the European Parliament 4-7 June 2009 – OSCE/ODIHR Expert Group Report*, 11-30 May 2009 (Warsaw: 22 September 2009), pp 5, 6.

⁴²⁷ Mark N. Franklin and Sara B. Hobolt, "The Legacy of Lethargy: How Elections to the European Parliament Depress Turnout", (2011) Vol. 30, *Electoral Studies*, pp 67-76, p 67.

abstention; the sooner EP elections became a real contest that has something real at stake, the better for democracy in Europe.⁴²⁸

In recent years, assumptions of the SONE model have been questioned on the premise that the same patterns of voting behaviour can be explained by a 'Europe matters' model. According to this model, lower voter participation and losses for government parties may not be solely related to a decline of governments' support in the middle of the national electoral cycle, but may be explained by government parties' stance on European integration.

3.3 Europe Matters Model

Some argue that there is no evidence for the second-order model explanation for low turnouts and find attitudes to the EU to have a significant impact on abstention.⁴²⁹ A rejection of the European Union as well as a lack of interest in European affairs serve as an explanation for abstention in EP elections. Vice versa, voters in support of the European Union are more likely to vote, although these effects are extremely small.⁴³⁰ This is contradicted by Hix and Marsh who find evidence that although EP elections should not be regarded solely as second-order contest, European matters remain at best a minor element in elections in most cases.⁴³¹ EP elections are rather a 'punishment towards governments' than

⁴²⁸ Mark N. Franklin and Sara B. Hobolt, *op.cit.*, p 75.

⁴²⁹ Jean Blondel, Richard Sinnott and Palle Svensson, *People and Parliament in the European Union – Participation, Democracy, and Legitimacy* (Oxford: Clarendon Press, 1998), p 236.

⁴³⁰ Cees van der Eijk and Hermann Schmitt, "Non-voting in European Parliament elections and support for European integration", pp 145-167 in Wouter van der Brug and Cees van der Eijk (eds.), *European Elections & Domestic Politics* (Notre Dame, Indiana: University of Notre Dame Press, 2007), pp 163.

⁴³¹ Simon Hix and Michael Marsh, "Punishment or Protest? Understanding European Parliament Elections", (2007) Vol. 69, No. 10, *The Journal of Politics*, pp 495-510, p 506.

‘protest against the EU’.⁴³² The electoral connection between citizens and the European Parliament remains weak. Voters do not first and foremost use elections to express their views on EU policy issues or choose political parties according to their programmes or performance.⁴³³

Most research suggests that when electors cast their vote, the decision is based on the national arena. However, as Hobolt and Wittrock have found out by testing SONE at the individual level of voters by experimental methods, those voters given information on European integration are more likely to make their choice on the basis of that information.⁴³⁴ As long as actors provide information, voters tend to make use of it in their electoral choice.

As Catherine de Vries *et al.* have observed, an increase of politicisation in member states on European issues ‘can be expected to strengthen the impact on vote choice in European Parliament (EP) elections’,⁴³⁵ depending on the degree of political information. Studies demonstrate that European effects are relatively weak compared to other choice determinants such as left/right orientations and domestic political matters.⁴³⁶ When parties and media provide more information on European matters, this has an effect on the role of European matters in voters’ choices. Voting on EU issues increases when party conflict and media attention

⁴³² Simon Hix and Michael Marsh (2007), *op.cit.*, p 507.

⁴³³ Simon Hix and Michael Marsh (2007), *op.cit.*, p 507

⁴³⁴ Sara Binzer Hobolt and Jill Wittrock, “The second-order election model revisited: An experimental test of vote choices in European Parliament elections”, (2011) Vol. 30, *Electoral Studies*, pp 29-40, p 29.

⁴³⁵ Catherine E. de Vries, Wouter van der Brug, Marcel H. van Egmond and Cees van der Eijk, “Individual and Contextual variation in EU issue voting: The Role of Political Information”, (2011) Vol. 30, *Electoral Studies*, pp 16-28, p 16.

⁴³⁶ Catherine E. de Vries, Wouter van der Brug, Marcel H. van Egmond and Cees van der Eijk, *op.cit.*, p 17.

about European matters is high.⁴³⁷ In general, higher levels of EU issue voting are more common among politically interested voters.⁴³⁸

The OSCE group found national campaigns centred on national dynamic between government and opposition parties, rather than between European parties represented in the EP. It has, however, observed the emergence of cross-border campaigning and a higher engagement of Members of the European Parliament, the Commission and member states' governments, adding a European dimension to the campaign.⁴³⁹ Cross-border campaigning served the purpose of reaching out to nationals speaking the same language; in case of 'European campaigning', topics included the debate on Turkey's accession and control of EU decisions by member states, but did not include European matters and did not follow the left and right divide.⁴⁴⁰ Competences of EU institutions in the legislative process are perceived by voters as 'distant and less clear' than in their member states, making it difficult for voters to judge the credibility of candidate MEPs' campaign promises.⁴⁴¹ So even if campaigning is related to the EU, it covers matters such as the distribution of power and accession of new member states rather than European issues following a debate between left and right of the political party spectrum.

⁴³⁷ Catherine E. de Vries, Wouter van der Brug, Marcel H. van Egmond and Cees van der Eijk, *op.cit.*, p 26.

⁴³⁸ *Ibid.*

⁴³⁹ OSCE, *op.cit.*, pp 32, 33.

⁴⁴⁰ OSCE, *op.cit.*, p 33.

⁴⁴¹ OSCE, *op.cit.*, p 34.

With regards to the role of Parliament in the media, news coverage on EP elections is typically rather low.⁴⁴² Schuck *et al.* have analysed the media coverage of the 2009 European Parliament elections.⁴⁴³ Their findings indicate that the degree to which EP elections are of interest to the media depends on political parties contesting in the elections. When political contestation between political parties develops beyond a certain point, an increase in media coverage occurs.⁴⁴⁴

The limited role of European parties in particular is responsible for the failure of European Parliament elections in providing legitimacy. After the adoption of Council Regulation 2004/2003, as amended in 2007, European parties received formal status distinct from political groups in the chamber.⁴⁴⁵ However, parties are restricted by Regulation in their campaign activities. Financial support is awarded proportional to the number of MEPs in Parliament, establishing the linkage between parties and respective groups. The overall budget accounts for 10 million Euros per year from the EU's general budget. National political parties are allowed to fund European parties as are natural persons who must be a member of that party. Party donations must not exceed 40 per cent of the parties' annual budget.⁴⁴⁶ The OSCE ascertained that European parties are not in possession of the necessary logistical and financial means for running a Europe wide

⁴⁴² Claes H. De Vreese, Edmund Lauf and Jochen Peter, "The media and European Parliament elections: Second-rate coverage of a second-order event?", pp 116-130, in Wouter van der Brug and Cees van der Eijk (eds.), *European Elections & Domestic Politics* (Notre Dame, Indiana: University of Notre Dame Press, 2007), p 128.

⁴⁴³ Andreas R.T. Schuck, Georgios Xezonakis, Matthijs Elenbaas, Susan A. Banducci and Claes H. De Vreese, "Party contestation and Europe on the news agenda: The 2009 European Parliamentary Elections", (2011) Vol. 30, *Electoral Studies*, pp 41-52, p 41.

⁴⁴⁴ Andreas R.T. Schuck, Georgios Xezonakis, Matthijs Elenbaas, Susan A. Banducci and Claes H. De Vreese, *op.cit.*, p 41.

⁴⁴⁵ European Commission Regulation No 1524/2007 of the European Parliament and the Council of 18 December 2007 amending Regulation No 2004/2003 on the Regulations governing European parties at European level and the rules regarding their funding.

⁴⁴⁶ OSCE, *op.cit.*, p 8.

campaign.⁴⁴⁷ This is aggravated by the fact that national parties run their own campaigns, without showing their affiliation with the respective umbrella organisation. Political parties perceive the national competition to be of higher importance.⁴⁴⁸ The Expert Group also hinted that some national parties did not wish to entirely support positions of European parties that they are associated with. European parties, in essence, worked as service providers for national parties by encouraging the use of common symbols and manifestos. Such manifestos are rather vague, because national member parties distinguish themselves with their own programmes.⁴⁴⁹ In none of the member states visited by the OSCE/ODIHR group has campaigning by European parties been visible.⁴⁵⁰

The lack of debate among parties is followed by scanty media coverage of the election event. The media landscape is shaped by national media and the few European media such as Euronews and European Voice reach a small number of people only. European, transnational media communication has been growing in recent years, mainly via the internet, for example in the format of euobserver and Euractive.⁴⁵¹ Journalists, editors and publishers affirmed to expert teams of the OSCE that EP elections receive less media attention than national elections, and in case of both being conducted simultaneously, the latter completely overshadow European Parliament elections.⁴⁵²

⁴⁴⁷ *Ibid.*

⁴⁴⁸ OSCE, *op.cit.*, p 8.

⁴⁴⁹ OSCE, *op.cit.*, p 9.

⁴⁵⁰ *Ibid.*

⁴⁵¹ OSCE, *op.cit.*, p 34.

⁴⁵² OSCE, *op.cit.*, p 34.

Hix and Marsh have found that, despite accepting variations over time, the SONE model is fairly robust across all seven sets of EP elections so far.⁴⁵³ Government parties as well as big political parties perform worse in European Parliament elections. Due to its ‘novelty factor’, the 1979 elections were the least second-order, but this effect has worn off quickly. Moreover, EU enlargement has not had any substantive effect on the success of opposition and small parties.⁴⁵⁴ Hix and Marsh have identified three patterns in party family performances in European Parliament elections:

- a decline of anti-European parties, not suggesting the European Parliament is more pro-European after the 2009 elections, but a decrease in the relative success of anti-European parties, e.g. the failure of the Libertas party;
- after the success of Green parties in 1989, the Greens have not been able to sustain their success in following sets of elections over and above small and opposition party status;
- poor performance of social-democratic and socialist parties from 1999, over and above large and government status.⁴⁵⁵

European elections might be contests with European citizens responding to policy concerns in a similar way as national elections, and in that sense, Europe

⁴⁵³ Simon Hix and Michael Marsh, “Second-order effects plus Pan-European political swings: An analysis of European Parliament elections across time”, (2011) Vol. 30, *Electoral Studies*, pp 4-15, p 12.

⁴⁵⁴ Simon Hix and Michael Marsh, *op.cit.*, p 12.

⁴⁵⁵ Simon Hix and Michael Marsh, *op.cit.*, p 12.

matters.⁴⁵⁶ Next to campaigns of political parties, campaign efforts of individual candidates are an important factor of the overall campaign, as Giebler and Wüst have found out.⁴⁵⁷ For an understanding of campaign effects in EP elections both parties and individual candidates are important.

Overall, research on electoral behavior has confirmed the second-order character of European Parliament elections compared to national elections. At the same time, evidence could be provided that EP elections become European contests if and when European issues matter.⁴⁵⁸ High levels of political party contestations on European issues have led to a higher salience of news coverage on the EU. A stronger focus on the European issues and corresponding media coverage have motivated the electorates to vote on European matters to a greater extent. Information on European matters can influence voting behaviour.⁴⁵⁹ Hobolt and Franklin discern greater party contestation on European issues as a key factor for

- encouraging stronger news coverage,
- voting to a higher degree on European issues,
- ‘higher responsiveness of party elites to voter preferences’ and
- ‘higher levels of citizen engagement and participation in European Parliament elections’.⁴⁶⁰

⁴⁵⁶ Simon Hix and Michael Marsh, *op.cit.*, pp 12, 13.

⁴⁵⁷ Heiko Giebler and Andreas M. Wüst, “Campaigning on an upper level? Individual campaigning in the 2009 European Parliament elections in its determinants”, (2011) Vol. 30, *Electoral Studies*, pp 53-66, p 53.

⁴⁵⁸ Sara B. Hobolt and Mark N. Franklin, *op.cit.*, p 2.

⁴⁵⁹ Sara B. Hobolt and Mark N. Franklin, *op.cit.*, p 2.

⁴⁶⁰ Sara B. Hobolt and Mark N. Franklin, *op.cit.*, p 2.

European Parliament elections have failed to provide legitimacy to the European Union. Due to an increase of competences over decades of the only EU institution directly elected by Europe's citizens,⁴⁶¹ further increases in the chamber's competences cannot be expected to make a significant change to this situation. The constant empowerment of the European Parliament in the process of European integration has not resulted in changes in the electorates' behaviour.

Findings confirm that European Parliament elections are not European elections, but a nearly simultaneous set of 27 national elections. The 'political setting' consists of 27 distinct national electoral environments. The democratic deficit of the federal model has its roots in the conduct of 27 different national elections instead of conducting one single European election. The second-order nature of European elections has a sobering effect on voters, aggravating low turnouts. However, as soon as actors provide information, voters tend to make use of it in their electoral choice. When parties and media provide more information on European matters, this has an effect on the role of European matters in voters' choices and voting on EU issues increases. It is difficult for voters to judge the credibility of candidate MEPs' campaign promises due to the low profile of European matters in campaigns. News coverage on EP elections is typically rather low, but when political contestation between political parties develops beyond a certain point, an increase in media coverage occurs. Funding of European parties requires further changes, because parties are lacking the necessary logistical and financial means for running a Europe wide campaign. In addition, national parties

⁴⁶¹ House of Lords, European Union Committee, *The Treaty of Lisbon: an impact assessment*, Volume I: Report, 10th Report of Session 2007-08 (London: The Stationary Office Limited, 13 March 2008), p 72.

run their own campaigns, without showing their affiliation with the respective umbrella organisation. As a result, the OSCE/ODIHR expert group did not discern any campaigning by European parties.⁴⁶² Next to campaigns of political parties, campaign efforts of individual candidates have proven as an important factor of the overall campaign.

Chapter Three has provided further evidence that competition between European political parties is essential for attracting media attention and for voters to be able to evaluate the performance and policies of parties. Enabling voters to articulate preferences about European-level politics and MEPs as well as for the position of European Commission President, for example, further requires strong European parties. Under the current set of national systems no European party lists exist which could foster such an electoral contest. As campaigning of individual candidates is also an important factor, a new system further necessitates a close contact between voters and their representatives. An ideal type electoral system therefore strikes the balance between linking voters to the European arena *and* enabling a link between voters and MEPs to address the democratic deficit of the federal model.

⁴⁶² *Ibid.*

Conclusion

The early phase from the founding years of the Communities to the first direct elections in 1979 was characterized by the competition of direct elections and a uniform system. Whereas both were regarded as essential in the unification of Europe and in the legitimation of power among followers of the federal model, the goal of direct elections was pursued first as finding consensus among all member states on a uniform system was deemed as extremely difficult. In the following decades, the increasingly bewildering variety of electoral systems added to the difficulty of addressing the democratic deficit via electoral reform under the federal model. But it was not until the late nineties before limited progress on the way the EP is elected was made by adopting common principles. European Parliament elections continue on the variety of member states' systems. While one can speak broadly of Europe-wide elections, there are significant variations in the way in which these elections are conducted across the member states. Chapter Three has provided further evidence for the decisive elements of an indicative ideal type electoral system in finding a remedy for the democratic deficit under the federal model. Competition between European political parties is essential for attracting media attention and for voters to be able to evaluate the performance and policies of parties. Enabling voters to articulate preferences about European-level politics requires European party competition as well as campaigning of individual candidates. An ideal type electoral system needs to achieve both, linking voters to the European arena *and* enabling a link between voters and MEPs to address the democratic deficit. The matter of an ideal type electoral system will be addressed in Chapter Six.

The European Parliament is apparently aware of this situation and has issued further Reports in the current legislature. Chapter Four will attend the latest development in European electoral reform.

CHAPTER FOUR

CURRENT DEVELOPMENTS IN THE FIELD OF

ELECTORAL REFORM IN THE EUROPEAN

PARLIAMENT – AN ANALYSIS OF

DUFF’S PROPOSALS

Introduction

In this Chapter I shall analyse current developments in the field of electoral reform in the European Parliament and assess Rapporteur Andrew Duff's proposals to address the democratic deficit of the European Union. The Rapporteur has issued six Reports, four of them in draft form, and a Resolution on the matter over a time span from 2008 until 2012 with a view for amendments to take effect in time for the 2014 elections to the European Parliament.

To get inside the subject of Duff's reform attempts, I have conducted interviews with the Rapporteur and his assistants in Brussels, in particular with his political advisor Sietse Wijnsma, over the course of this PhD to receive insights on reform proposals not covered in published documents or press releases. For example, interviews provided information on the results of committee coordinators' meetings, Conference of Presidents'⁴⁶³ decisions etc. The author did not solely rely on interviews, but ensured availability of all relevant primary sources and received all Reports issued by Andrew Duff in their different draft stages of development and thereby obtained an accurate and exclusive body of source material. The overall picture has been complemented by following press conferences, parliamentary sessions and media coverage on the attempted reform of amending the 1976 Elections Act.

In this Chapter, to start out with, I investigate the model Rapporteur Duff applies to the EU and which manifests itself in the reform proposals. Hereinafter the democratic model and the corresponding electoral system of the Rapporteur shall

⁴⁶³ Composed of the President of the European Parliament and heads of parliamentary groups, Rule 23 of the European Parliament's Rules of Procedure.

be analysed. I shall turn to showing differences to the current system of electoral laws in Section 3, the final Section of Chapter Four.

Chapter Five will then continue on the matter of electoral reform by analysing responses of various actors to the Duff Reports and by assessing models reflected in those partly diverging, partly consenting positions and discern alternative reform proposals. Based on findings of this thesis, Chapter Six presents core elements of an ideal type electoral system to remedy the European democratic deficit which exists first and foremost under the federal model and presents a translation of the ideal type electoral model into core elements of a draft European Elections Act. But first, I shall begin with my analysis of the Duff Reports.

1. Reform Proposals and Underlying Model of the EU

Towards the end of the European Parliament's last legislature from 2004 to 2009, the chamber's Constitutional Affairs Committee, AFCO, nominated Andrew Duff, Liberal Democrat Member for East of England constituency and Spokesman for the Alliance of Liberals and Democrats for Europe, ALDE, in the Committee as Rapporteur on electoral reform. He was re-elected for that position at the beginning of the current legislature running from 2009 to 2014. As the political opinions and ambitions of the in charge Rapporteur decisively influence the pitch of Reports, I shall examine Duff's background to the degree it reveals his understanding of the model of the EU and his approach to remedy the democratic deficit. In the course of carrying out research for this thesis, especially when conducting interviews, the author had to cope with models being not necessarily used by actors in the same way as in academic research. Sometimes, no model is

used at all, sometimes actors unknowingly apply a model of the EU. I shall start out with analysing the model of Rapporteur Duff.

1.1 UEF and Spinelli Group

At the European Movement's Paris congress of 2008, delegates elected Duff as the President of the Union of European Federalists and re-elected him two years later. The Union of European Federalists is a non-governmental organisation and calls itself supranational.⁴⁶⁴ The term 'supranational' in this context is not to be understood in the context of the supranational technocratic model, as the UEF is 'dedicated to the promotion of a democratic and federal Europe' and 'aims to bring together citizens who desire to work for the federal unity of Europe'.⁴⁶⁵ The Union of European Federalists was founded shortly after World War II 'with the belief that only a European Federation, based on the idea of unity in diversity, could overcome the division of the European continent'.⁴⁶⁶ Current political goals include

- 'the creation of a European economic government,
- the call for an inter-parliamentary conference to prepare the revision of the multi-annual financial framework and the reform of the own-resource system,
- the reform of the electoral procedure of the European Parliament in time for the 2014 elections including transnational lists,
- the promotion of a European citizens' initiative,

⁴⁶⁴ Union of European Federalists, UEF, URL <http://www.federalists.eu/>, on web 18 June 2012.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Union of European Federalists, UEF, URL <http://www.federalists.eu/uef/>, on web 18 June 2012.

- the relaunch of the constitutional process by the European Parliament with the goal of creating a European Federal Union, if necessary involving a core group of states,
- and a coordinated action of all pro-European associations, in liaison with the Spinelli Group, to relaunch the process of European political integration in the perspective of 2014.⁴⁶⁷

Andrew Duff's UEF, unsurprisingly, attributes Federalism as a model for the integration process as well as the goal of European integration in the form of a federation. Electoral reform features highly in the movement's ambitions, with a key element of transnational lists prominently emphasised.

Furthermore, Rapporteur Andrew Duff is the co-chair of the Spinelli Federalist Intergroup in the European Parliament. The perceptions and ambitions of the Spinelli federalist Intergroup reflect those of the UEF. The group is named after Altiero Spinelli, a former Italian resistance fighter and founder of the European Federalist Movement in Milan in August 1943, who became an MEP later and the President of Parliament's Institutional Commission which promoted the establishment of a European Union in the 1980s. Members of the Spinelli group include prominent actors such as Mario Monti, Jacques Delors, the 'grand old man of European federalism',⁴⁶⁸ Pat Cox, Joschka Fischer and Guy Verhofstadt. The MEP Spinelli group has 108 bipartisan MEP members. The group itself describes its political agenda as 'federal and post-national steps' in different fields

⁴⁶⁷ Union of European Federalists, UEF, URL <http://www.federalists.eu/policies/>, on web 18 June 2012.

⁴⁶⁸ EUobserver, Honor Mahony, *MEPs to set up anti-intergovernmentalism group*, 13.09.2010, p 1.

of European politics such as citizenship, defence or culture and education.⁴⁶⁹ The Federalist intergroup was formed in 2009 after the elections to the new European Parliament ‘to spearhead Parliament’s work in political and constitutional affairs’.⁴⁷⁰ Supporters include Alain Lamassoure (EPP), chairman of the Budget Committee, and Jo Leinen (S&D), chairman of the Environmental Committee. Apart from its parliamentary wing, the Spinelli group brings together think tanks, academics, writers and politicians supporting a federal minded form of European integration. At the time of formation, Duff held that the coordination of the broad pro-European majority in the House was essential to a further development of post-national parliamentary democracy. The idea is the brainchild of Guy Verhofstadt, president of the liberal ALDE group in Parliament, and Daniel Cohn-Bendit, head of the Green’s group.⁴⁷¹ Next to the at that time still ongoing ratification of the Lisbon Treaty, a reform of the electoral procedure and a reform of the financial system of the European Union were priorities to the intergroup.⁴⁷² Gains by political parties from the nationalist right in the recent EP elections contributed to the formation of the federalist intergroup.⁴⁷³ EUobserver evaluated the set-up of the group as a ‘counter-offensive’ to a perceived rise of intergovernmentalism in the European Union to promote the importance of the EU and its institutions.⁴⁷⁴ Members of the group perceived a rise of supremacy of EU member states in decision-making at the expense of more European Pan-

⁴⁶⁹ The Spinelli Group, MEP Spinelli Group, URL <http://www.spinelligroup.eu/actions/mep-spinelli-group/>, on web 19 June 2012.

⁴⁷⁰ Union of European Federalists, UEF, URL [http://en.federaleurope.org/index.php?id=6719&tx_ttnews\[tt_news\]=2387&th_ttnews...](http://en.federaleurope.org/index.php?id=6719&tx_ttnews[tt_news]=2387&th_ttnews...), on web 08.09.2009.

⁴⁷¹ EUobserver, Honor Mahony, *MEPs to set up anti-intergovernmentalism group*, 13.09.2010, p1.

⁴⁷² Union of European Federalists, UEF, URL [http://en.federaleurope.org/index.php?id=6719&tx_ttnews\[tt_news\]=2387&th_ttnews...](http://en.federaleurope.org/index.php?id=6719&tx_ttnews[tt_news]=2387&th_ttnews...), on web 08.09.2009.

⁴⁷³ *Ibid.*

⁴⁷⁴ EUobserver, Honor Mahony, *MEPs to set up anti-intergovernmentalism group*, 13.09.2010, p 1.

Community decision making via the Commission and the European Parliament. The groups' aim is to 'make the case for closer European integration and stand up against encroaching nationalism and intergovernmentalism that is beginning to undermine European unity'.⁴⁷⁵

The Spinelli group and Duff's federalist intergroup have a clear disposition towards a federal model of the EU. Elements of postnational democracy are to counter a perceived shifting of weight towards intergovernmentalism. The European Parliament is regarded a central actor with regards to addressing the democratic deficit, as can be seen by the setup of the parliamentary intergroup. Both non-governmental organisations of which Rapporteur Andrew Duff is a prominent member, the UEF and the Spinelli group, make the case for closer European integration. A federal Europe in the form of a European Federation is the declared *telos* of the integration process. These pressure groups and their federal perception of the EU demand a European Federal Union, if necessary involving only a core group of states. A relaunch of the process of European political integration is a further postulation, inherent to calls for federal and post-national steps, also to counter intergovernmental tendencies in the European Union. Both the UEF and the Spinelli Group call for post-national parliamentary democracy.

1.2 Rapporteur Andrew Duff

Coming back to the author of the Reports on electoral reform himself, Rapporteur Andrew Duff, MEP, was a member of the Convention on the Charter of

⁴⁷⁵ EUobserver, Honor Mahony, *MEPs to set up anti-intergovernmentalism group*, 13.09.2010, p 2.

Fundamental rights and of the Convention on the Future of Europe. He also represented the European Parliament in the intergovernmental conference on the Treaty of Lisbon. His publications include ‘Saving the European Union: The Logic of the Lisbon Treaty’, ‘Post-national democracy and the reform of the European Parliament’, a proposal for a European Fiscal Solidarity Treaty and New Financial Authority, ‘Federalists Say Action Needed To Put In Place Euro Government’ and ‘federal union now’.⁴⁷⁶

To date, Duff has produced six consecutive Reports⁴⁷⁷ and one Resolution on the matter of a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, two of which⁴⁷⁸ have been voted upon in AFCE and have thereby entered

⁴⁷⁶ Andrew Duff, *Saving the European Union: The Logic of the Lisbon Treaty* (London: Shoehorn Media 2009); Post-national democracy and the reform of the European Parliament (Paris: Notre Europe 2010); URL <http://andrewduff.eu/en/article/2012/591567/proposal-for-a-european-fiscal-solidarity-treaty-and-new-financial-authority>, on web 19 June 2012; <http://andrewduff.eu/en/article/2012/592397/federalists-say-action-needed-to-put-in-place-euro-government-now>, on web 19 June 2012; *Federal Union Now* (London: Federal Trust for Education and Research 2011).

⁴⁷⁷ Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report I, 15.10.2008, 2007/2207 (INI); Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report II, 12.04.2010, 2010/xxxx/(INI); Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report III, 05.11.2010, 2009/2134/(INI); Andrew Duff, Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0176/2011, 28.04.2011, Report IV/I (First official Report); Andrew Duff, Draft Second Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), 20.09.2011, Draft Report V (Draft Report II, to become Second official Report), 20.09.2011, 2009/2134 (INI); Andrew Duff, Second Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0027/2012, 01.02.2012, Report VI/II; European Parliament Resolution of 22 November 2012 on elections to the European Parliament in 2014, P7-TA-PROV(2012)0462, B7-0520/2012, adopted by 316 votes to 90 with 20 abstentions, adopted by Parliament in single reading.

⁴⁷⁸ Andrew Duff, Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0176/2011, 28.04.2011, Report IV/I (First official Report); Andrew Duff, Second Report on a proposal for a modification of the Act concerning the election of the members

the path of European law-making. In the end, Parliament issued a Resolution on the elections to the European Parliament in 2014 with the aim of ‘reinforcing the political legitimacy of both Parliament and the Commission’.⁴⁷⁹

1.3 The Reports

As the Rapporteur’s activities and publications have shown, he has a federalist background. When investigating the model of the EU that manifests itself in the Rapporteur’s Reports, it has to be kept in mind that a broad and convincing majority in the Constitutional Affairs Committee, AFCO, in parliamentary groups and in the chamber is needed to avoid a fate similar to that of, for example, the Bocklet Report, before the Report is forwarded to the Council, where it will need to be agreed upon unanimously before the European Parliament can give its consent to any compromise. Despite a strong federalist intergroup of nearly all political colours in the House, this position can by no means be taken for the singular and uncontested view in Parliament, as Chapter Five shall reveal. In his electoral reform proposals, Duff therefore had to get rid of strong federalist vocabulary which might be irritating to more moderate colleagues or even considered to be offensive by actors with a leaning towards other models of the EU than the federal model, for example to proponents of the EU as an international organisation. When looking for signs and evidence on the underlying models of integration, the Duff Reports will, due to the constraints of bargaining

of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0027/2012, 01.02.2012, Report VI/II.

⁴⁷⁹ European Parliament Resolution of 22 November 2012 on elections to the European Parliament in 2014, P7-TA-PROV(2012)0462, B7-0520/2012, adopted by 316 votes to 90 with 20 abstentions, adopted by Parliament in single reading.

processes in day to day politics, have to be far more open and accepting than, for example, publications by the Rapporteur on the future of Europe.

A good source for analysing the thrust of Reports is the motions. Since the motion for a European Parliament Resolution of the nascent state first draft version that left the drawing board,⁴⁸⁰ several key elements remained unchanged in Draft Report I and carried through following Reports. In particular, motions contained reference to the 1976 Elections Act, the Treaty mandate for a uniform procedure, an increased standing of the European Parliament under the Lisbon Treaty, the merits of the Anastassopoulos Report, and the demand for a consequent implementation of the principle of degressive proportionality, meaning that the larger the member state, the more citizens should be represented by one MEP coming from that state.

The 1976 Elections Act represents a turning point for the European Parliament, as it constituted the legal basis for the first direct elections by universal suffrage to the House in 1979.⁴⁸¹ Conforming to the federal route of legitimation, a European electorate votes for European parties, which form a European executive. In that sense, the first elections constituted an important step under the federal model because they provided citizens with a choice. However, member states were allowed to retain their national electoral systems until a uniform electoral system

⁴⁸⁰ Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2007/2207(INI)), first version of 17.09.2008.

⁴⁸¹ Council Decision 76/787/ECSC, EEC, Euratom, OJ L 278, 8.10.1976, p. 1., as modified by Council Decision 93/81, OJ L 33, 9.2.1993, p. 15., and by Council Decision 2002/772/EC, Euratom, OJ L 283, 21.10.2002, p. 1.

could be derived, showing a more intergovernmental approach despite a Treaty obligation for a uniform procedure.

Because the six Duff Reports were issued over a time span of four years, the constitutional framework changed as well. The Treaty of Lisbon was signed on 13 December 2007 and entered into force, eleven months later, on 1 December 2009. Since the second draft Report, reference is made to the respective Articles amended by the Treaty of Lisbon of the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU): instead of Article 190 TEC, later Reports regard provisions on democratic principles of Title II TEU, in particular on citizenship and equality, representative democracy and on the role of European political parties, on MEPs now being ‘representatives of the Union’s citizens’ instead of representatives ‘of the peoples of the States brought together in the Community’, and on the ordinary revision procedure for the Treaties by means of a Convention and a right of initiative for the EP therein.⁴⁸² The right of expat voting of EU citizens is also highlighted as an important element concerning the electoral procedure.⁴⁸³ The second Report also far more clearly emphasises the EP’s right of initiative to reform the electoral procedure and to give its consent.⁴⁸⁴ Next to stating the out of the view of the federal model significant constitutional changes, the latter also serves the purpose of bringing the EP’s constitutional requirement of initialising electoral reform home to fellow MEPs. Duff reiterates Parliament’s ‘increased powers and influences’⁴⁸⁵ since it was first directly

⁴⁸² Articles 9, 10, 14 (2), 48 TEU.

⁴⁸³ Article 22, TFEU; It further now regards Protocol No 7 on the Privileges and Immunities of the European Union and Rules 41, 48 (3) and 74a of the European Parliament’s Rules of Procedure.

⁴⁸⁴ Article 223, TFEU; Andrew Duff, Draft Report II, *op.cit.*, p 3.

⁴⁸⁵ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), *ibid.*

elected in 1979. As examples, he sets out the very substantial gain of powers under Lisbon in the form of new fields of legislation, the budget and the election and scrutiny of the Commission. With regards to the model of the EU, the Rapporteur regards the European Parliament as a central actor in the constitutional order of the European Union.

Duff also makes reference to Parliament's previous Resolutions on the electoral procedure of the Parliament, in particular to its Anastassopoulos Report of 15 July 1998.⁴⁸⁶ The 1998 Anastassopoulos Report has been Parliament's last Report on the reform of the electoral system and contained, apart from elements taking advantage of the new opportunity of 'common principles' of the Treaty of Amsterdam such as making proportional representation mandatory within all member states, the proposal to elect 10% of Parliament's deputies by transnational lists in a European constituency to strengthen European parties and foster European campaigns. In that sense, the idea of European party lists has always been a federal theme. Eventually, this proposal came to a stop in the Council and only the more moderate proposals of the Anastassopoulos Report were accepted. Furthermore, Duff points out the Lamassoure-Severin Report of 11 October 2007 on the composition of the European Parliament.⁴⁸⁷ One of the key principles in the Report has been the element of degressive proportionality, which Duff considers to be an 'elegant federal principle'.

Duff advocates an electoral system and internal organisation which corresponds to Parliament's position in the EU's constitutional structure. As major goals of his

⁴⁸⁶ Anastassopoulos Report, OJ C 292, 21.9.1998, p. 66.

⁴⁸⁷ Lamassoure-Severin Report, OJ C 227 E, 4.9.2008, p. 132.

reform attempts, Duff names Parliament's need for 'an enhanced standing in the eye of the public so that it becomes the focus of the new European political space, the accepted forum of the single political market: making European laws and budgets, and holding the executive to account.'⁴⁸⁸ The chamber's search for political legitimacy was being undermined by the continuing decline in turnout at elections, by scanty media reportage, by apathetic political parties and, even, by the latent jealousy of some national parliaments about its growing powers.⁴⁸⁹

The Rapporteur's attachment to the federal model becomes evident not only in his publications and those of his pressure groups, but to a more subtle degree also in his Reports on electoral reform. His referral to the importance of the 1976 Elections Act as well as to the strong role of the European Parliament under Lisbon reveal the pivotal role the Rapporteur allocates the EP as a legitimating mechanism and the importance of competition between European political parties to tackle the democratic deficit. The Anastassopoulos Report, the latest Report adopted by Parliament to propose transnational lists, features highly in Duff's esteem. As has been shown above, transnational lists are an objective of federal minded actors. The principle of degressive proportionality constitutes Duff's favoured route with regards to the distribution of seats, trying to attempt greater proportionality of allocating the number of seats between member states. On the matter of a uniform system or common principles, the very purpose of a new Report is greater uniformity. That does not mean a full harmonisation of electoral laws, but more uniform elements can be expected from his Reports. The Rapporteur regards federalism as the underlying model of integration as well as

⁴⁸⁸ Andrew Duff, Draft Report I, *op.cit.*, p 40.

⁴⁸⁹ *Ibid.*

the *telos* of the EU in form of a federation, a United States of Europe. To him, federalism serves as both a model as well as the goal of European integration. I shall analyse Duff's corresponding democratic model and electoral system in the following paragraph before coming to more detailed differences to the current systems.

2. Democratic Model and Electoral System

In this subsection, I shall analyse the democratic model and the corresponding electoral system of Andrew Duff. Compatible to the Rapporteur's federal model of the European Union, a democratic model with a tendency towards the consensual model is consistent due to the diversity of federal systems. Such systems follow the consensus model rather than the majoritarian model. Accordingly, associate electoral systems emphasise values of fairness and equality rather than accountability and stability. A revised PR system or a TTD system can be a possible translation into practice. A prominent feature of the Duff reports will be elements of transnational democracy, transcending national boundaries and inducing competition on the European level, foremost by the introduction of transnational lists, reflecting the Rapporteur's federal model.

In his Reports, Duff puts an emphasis on the development of transnational or post-national democracy. There is a strong bias towards the federal model. With regards to Duff's democratic model, he combines the concept of European citizenship which has been introduced by the Treaty of Maastricht in 1993 with the element of transnational democracy.⁴⁹⁰ In the Rapporteur's view, the right to

⁴⁹⁰ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), p 3.

participate under certain conditions in European and municipal elections in Member States other than one's own, and the Charter of Fundamental Rights, first proclaimed at Nice in 2000, have contributed to the gradual development of post-national democracy. Out of the development of Europe's electoral laws over the last three decades, Duff recognises a gradual convergence of electoral systems over this period and sees substantial progress in the EU in establishing basic preconditions for a European uniform electoral procedure, despite the absence of a single electoral law. In his terms, some of the major obstacles encountered by his predecessors as Rapporteurs on electoral reform have already been dispensed with satisfactorily. In particular, he values highly the universal adoption of proportional representation in 1999, the formal establishment of political parties and political foundations at EU level,⁴⁹¹ the harmonisation of terms and conditions of MEPs,⁴⁹² and the abolition of the dual mandate by inserting a binding list of incompatibilities.⁴⁹³

On the other hand, Duff also acknowledges Parliament's democratic deficits, which he outlines with a low popular recognition of Parliament's important democratic function, weak political parties at European level, electoral campaigning remaining more national than European, a poor media coverage of Parliament, and an overall turnout in the elections to the European Parliament which has fallen steadily from 63 per cent in 1979 to 45.6 per cent in 2004.⁴⁹⁴ As a mirror-image, the Rapporteur has an interest in a better standing of the EP in the

⁴⁹¹ Regulation (EC) No 2004/2003 governing political parties at European level and the rules regarding their funding, OJ L 297, 15.11.2003, p 1.

⁴⁹² Andrew Duff, Draft Report I, *op.cit.*, p 39.

⁴⁹³ Council Decision 2002/772/EC, Euratom, Article 1(7)(b).

⁴⁹⁴ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), p 4. After the accession of the new member states of Bulgaria and Romania and the subsequent byelections, overall turnout has fallen to 43 %.

eyes of the public, in stronger European political parties, European electoral campaigning, more and better media coverage of the EP's business, and higher voter participation in elections, reflecting Duff's democratic model of a European post-national democracy.

Duff sees a discrepancy between an increase of the EP's powers on the one side and the standstill in terms of reform of the 1976 Elections Act on the other. The increase in powers has in Duff's terms not been mirrored by the moderate revisions of the 1976 Act so far. The Rapporteur connects the constitutional novelties introduced by the Treaty of Lisbon with his electoral reform intent. In particular, he underlines the formalisation of the principle of degressive proportionality in the composition of Parliament and, further, laying down that Parliament 'shall be composed of representatives of the Union's citizens'⁴⁹⁵ - as opposed to the former definition of MEPs as 'representatives of the peoples of the States brought together in the Community'⁴⁹⁶. Duff connects the matters of representation and European citizenship with electoral reform, putting an emphasis on the European or post-national level of democracy, following a federal model of legitimation.

The Rapporteur justifies the timing of his reports by taking Council at his own words: Council had previously agreed to keep the 1976 Act under review,⁴⁹⁷ but the last formal review of the electoral procedure by Parliament was initiated as

⁴⁹⁵ Article 14 TEU (consolidated version).

⁴⁹⁶ Article 189 TEC.

⁴⁹⁷ Council declaration 6151/02 of 22 February 2002 decided 'that the provisions of this Act should be reviewed before the second elections to the European Parliament held after the entry into force of the amendments to the 1976 Act which are the subject of this Decision' - that is, before the 2009 elections to the European Parliament.

long ago as 1998 – without any further developments in this field since then. Coming to indicative elements of the proposed electoral system, the electoral reform of the European Parliament, in Duff's terms, 'must uphold the practice of free and fair elections, and must not violate the overall proportionality of the system; the modernised electoral law must be durable and comprehensible; the principles of subsidiarity and proportionality must be fully respected so that uniformity is not imposed for its own sake.'⁴⁹⁸ A central value behind the Reports is the value of fairness, which is associated with proportionality. There is no reference to accountability and a majoritarian system. PR systems have the advantage of enabling minorities to be represented and are connected with broad and fair representation. The Rapporteur regards the electoral system as an opportunity for the purpose of greater proportionality, a value typical for federal systems following a consensual model.

Andrew Duff has a preference for more uniform elements of electoral systems instead of common principles, underlining his post-national model. In the Motions he stresses the discrepancies among electoral systems used by member states requiring review, he mentions in particular divergences with regards to constituencies and the use of preferential voting, the question of the existence and the level of legal thresholds, a diverging minimum age for participation in the elections, the use of electronic polling, gender balance among candidates, the rights of minority-language communities, the date and schedule of the poll, the verification of the credentials of MEPs, the filling of vacancies and the privileges

⁴⁹⁸ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), p 5.

and immunities of MEPs.⁴⁹⁹ The Rapporteur critically observes that the distribution of parliamentary seats between member states and the overall size of the House have been the cause of fierce debates in every Intergovernmental Conference (IGC) on the revision of the Treaties, as well as at each accession of a new Member State,⁵⁰⁰ indicating he intends to offer proposals for improving the situation.

When reiterating the EP's past attempt to reform the electoral system in the Anastassopoulos Report, Duff highlights its key proposal to elect 10 per cent of MEPs from transnational constituency lists. These attempts, however, 'have gone largely unheeded'.⁵⁰¹ Alongside a consensual model fitting his federal understanding of the European Union, Duff intends to use electoral reform as a next step towards post-national democracy. Competition is supposed to come into existence at the European level via transnational lists. The elements of fairness and proportionality translate into a PR electoral system, combined with a second tier of transnational lists in a European constituency.

The low number of EU citizens resident in Member States other than their own who vote in elections to the European Parliament and the 'negligible' number who stand for election is another of Duff's concerns.⁵⁰² Residency qualifications for the franchise vary among Member States as well as the time after which their own nationals resident elsewhere in the EU are deprived of their right to vote at home does. Member States enjoy, according to the case law of the Court of Justice,

⁴⁹⁹ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), p 5.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Andrew Duff, *ibid.*

⁵⁰² *Ibid.*

substantial discretion in defining who can vote in European parliamentary elections, they are nevertheless bound to respect the general principles of EU law and are precluded from treating different categories of EU citizens who are in the same circumstances in a different way.⁵⁰³ At the time of the draft first Report, a proposal of the Commission to facilitate electoral participation by EU citizens resident in Member States other than their own was stalled in the Council; the Commission's proposals did not intend to enable suitably qualified candidates to stand on more than one national list at the same election despite the fact that this is not proscribed by the Act.⁵⁰⁴

In reference to the OSCE/ODIHR expert group's mission to the 2009 EP elections, Duff urges the European Parliament not to be complacent about its own electoral methods. Because it would regularly preach the virtues of pluralist liberal democracy to other countries it would need also to be more self-critical. During the 2009 European Parliament elections, the OSCE/ODIHR conducted its first fully-fledged observer mission to the chambers' elections.⁵⁰⁵ The OSCE team was struck by how different the elections were in each State, noting variances in the methods of distributing seats, the possibility to cast preferential votes, the allocation of vacant seats, franchise, candidature, nomination of candidates, constituencies and polling days. The international observers also found it odd that

⁵⁰³ Case C-145/04 *Spain v. United Kingdom* [2006] (Gibraltar) and Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] (Aruba).

⁵⁰⁴ See Council Directive 93/109/EC of 6 December 1993 on the right to vote and stand in elections to the European Parliament for Union citizens residing in a foreign Member State, OJ L 329, 30.12.1993, p. 34, and Parliament's legislative resolution of 26 September 2007 on the proposal for a Council directive amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ C 219 E, 28.8.2008, p. 193, Report by Andrew Duff.

⁵⁰⁵ OSCE, Office for Democratic Institutions and Human Rights, *Elections to the European Parliament 4-7 June 2009 – OSCE/ODIHR Expert Group Report*, 11-30 May 2009 (Warsaw: 22 September 2009).

the European political parties are effectively forbidden from electoral campaigning.⁵⁰⁶

The OSCE/ODIHR criticised in particular:

- ‘a lack of harmonization of candidacy requirements throughout the EU;
- a lack of provisions in some States allowing individual candidates to run in the elections in line with OSCE commitments;
- a lack of provisions in some States on voting rights, particularly for prisoners and for EU residents who do not hold citizenship of any State;
- a lack of possibility to appeal to a court decision regarding election results in some States;
- a lack of provisions in some States to ensure adequate access and cooperation for domestic and international observers, in line with OSCE commitments’.⁵⁰⁷

Their recommendations included:

- ‘reviewing some of the current practices for awareness-raising campaigns with a view to increasing effectiveness and avoiding possible perceptions of partisanship;
- ensuring that national campaign legislation adequately addresses the activities of European-level political parties;
- unifying the dates of the elections in order to ensure that the publication of results respects both the need for transparency and the need to avoid potential influence on the results in other States;

⁵⁰⁶ Regulation EC 2004/2003, as amended in 2007.

⁵⁰⁷ OSCE, *op.cit.*, p 2.

- improving the process of exchange of information on registered voters so as to protect the equality of the vote and avoid possible multiple voting;
- amending legislation where necessary to provide for an independent media monitoring mechanism to assess whether media provisions are respected during the campaign period'.⁵⁰⁸

Duff describes the aims of his reform attempts as ‘enhancing the popularity of Parliament across the Union, of reducing dissimilarities between the electoral procedures of Member States, and of making Parliament more accountable to the citizens it represents’.⁵⁰⁹ Popularity points towards the low and declining turn-outs in EP elections; reducing differences of the current hotchpotch of electoral systems is a further aim, with the Rapporteur’s focus on greater integration at the European level, reflecting his federal model. Accountability, in connection with electoral systems usually tied to majoritarian systems, has to be interpreted here in terms of strengthening the link between citizens and Parliament. There is also a possibility of raising the attention of his colleagues from the UK, who are more accustomed to a majoritarian model.

The Rapporteur critically attends the question whether a formal reform of the electoral procedure could rectify the above mentioned problems to the democratic deficit. He advises to carefully define the criteria for initiating a new bout of reform. Uniformity should not be sought for uniformity’s sake. Duff revisits the concept of gradualism, which has been used in the field of electoral reform since the 1950s and is followed in the Reports of Teitgen, Seitlinger and Patijn. The Rapporteur concedes that his reform attempt is unlikely to be the last, because

⁵⁰⁸ OSCE, *ibid.*

⁵⁰⁹ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), p 5.

strong parliaments would ‘adapt readily to changing societal and political circumstances.’⁵¹⁰ The pace and scale of future enlargement is a big unknown in the case of the EU, and ‘it would be foolhardy to try to settle today the final destiny of post-national parliamentary democracy in Europe,’⁵¹¹ without knowing the future size and shape of the Union.

However, Duff confidently evaluates future prospects for the EP’s role as he is ‘certain that a strong, vital, directly elected Parliament should be - and will be - at the heart of its system of governance.’⁵¹² Duff recognises a significant number of important questions. He believes that attending those would make the elections to the Parliament more uniform in the future than they have been in the past and would bring benefits in terms of cohesion, legitimacy, efficiency and pluralism. He therefore considers that a review is needed of the different national electoral systems in use ‘with a view to ironing out the more obvious dissimilarities and anomalies.’⁵¹³

The following elements were to be implemented in time for the 2014 elections according to his first draft Report,⁵¹⁴ and most elements kept reoccurring in subsequent Reports:

Following his federal approach, the enhancement of a European transnational democracy through the creation of a single European constituency and

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ Andrew Duff, DRAFT REPORT I, first draft version of 17.09.2008, 2007/2207(INI), pp 6, 7; Please refer to Appendix I for further details.

transnational party lists is maintained in all six Reports, although it is ‘hidden’ at subparagraphs (f) and (g) in the first Report’s ‘wish list’. The first draft of Duff Report I foresaw a number of candidate MEPs per transnational party list equivalent to the number of member states, 25 at the time of the draft Report. The number of 25 persisted through the reports, despite the fact that the number of Member States has risen to 27 in the meantime. Candidate lists would need to be drawn from a minimum of the quarter of member states and gender balanced. Preferential voting would be allowed in the form of semi-open lists, seats allocated according to Sainte-Laguë. Candidates could at the same time stand on the EU-wide list as well as for their national or regional, respectively, constituency.

The next sub-paragraph (h) sees another key element of this draft, the creation of a European electoral authority with the task of monitoring and conducting elections under the European lists, also verifying the credentials of MEPs from that list. This verification is currently solely the member states’ responsibility. Despite the fact that the electoral authority should be assembled by a representative from each member state, it would be chaired by the Commission, to ensure the supranational or federal perspective in the driving seat instead of national or intergovernmental approaches.

Duff’s proposal to make regional constituencies mandatory resembles what Anastassopoulos called the ‘close relationship principle’. By means of reapportionment in the form of smaller constituencies, this element tries to make it easier for the electorate to identify itself with candidates and mandated

parliamentarians and thereby increase the quality of representation by means of stronger accountability.⁵¹⁵

Catering for the needs of minorities that would otherwise not be represented in parliament is the concept behind (b). This point further emphasises the Rapporteur's focus on values such as fairness, associated with proportional systems.

Giving voters a choice in the fashion of preferential voting of candidates by means of semi-open lists pursues the theory of engaging voters while giving them a broader range of choice. On the other hand, the role of political parties is more limited, as the sole power of setting up candidate lists is softened to the degree that voters can shuffle the order of the candidate lists presented to them. This suggestion tries to find a balance between closed lists with the effect that they put political parties in a strong position and make parties more visible and give them a pronounced public perception and, on the other side of the spectrum, open lists that offer voters the choice to split their votes and spread them among lists of different party lists or even to cumulate a number of votes of a single voter on specific candidates.⁵¹⁶ The report offers a compromise line between these two methods.

⁵¹⁵ See, for example, S. Hix in AFCO, *Workshop 'Citizenship and Electoral Procedure'*, (Bruxelles: organised by Policy Department C 'Citizens' Rights and Constitutional Affairs, 25/26 March 2008), p 6.

⁵¹⁶ Panachage and accumulation of votes.

By limiting the number of deputies per member state ranging from five to 95,⁵¹⁷ the Rapporteur tries to implement to the principle of degressive proportionality, that way trying to strike a balance between the equality of the vote on one hand and a stronger representation of electorates from small states compared to that of the bigger states on the other. MEPs from member states with a larger population represent a bigger number of citizens, and at the same time larger member states have more MEPs than smaller member states.⁵¹⁸ The proposal also intends to get rid of the extra seat that was won by the Italian government in the run up to the Lisbon Treaty during the IGC of Rome.⁵¹⁹ This extra seat for Italy represents one of the infringements of the principle of degressive proportionality. At current, an Italian MEP represents only 840.000 citizens, whereas an MEP from Spain represents 920.000.⁵²⁰ To avoid any bargaining on the number of MEPs per state in the future, the Report suggests basing future decisions on a strictly statistical basis using Eurostat data before every EP election.

Polling would be limited to consecutive Saturdays and Sundays instead of the current four day period to focus public alertness to the EU-wide nature of the event of EP-elections. Bringing forward election time from June to May tries to get EP-election out of the holidays in some of the member states and to increase turnout. Taking the same line, the voting age would be lowered to sixteen, trying

⁵¹⁷ At current Lisbon foresees 6 to 96, but because the last set of elections took place according to the Nice Treaty due to the pending ratification of the Lisbon Treaty, Germany still holds 99 seats. The present number of seats, therefore, is 754 instead of 751.

⁵¹⁸ Declaration No 5 annexed to the Final Act of the IGC. The formula is: '[T]he ratio between the population and the number of seats of each Member State must vary in relation to their respective populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more seats than a more populous Member State'.

⁵¹⁹ 750 seats plus one extra seat for the President of the House.

⁵²⁰ <http://epp.eurostat.ec.europa.eu/>, on web 14 December 2012.

to get voters at a younger age accustomed to the democratic process.

Proposals would further give Parliament to decide on the credentials of its own members and to settle any disputes arising. In the light of the dispute about the filling of vacancy due to the death of Polish MEP Bronisław Geremek between the EP and the member state's government, this proposal tries to give the European Parliament control of the monitoring process of the House's deputies and to be able to counteract any interference by member states with the mandate of MEPs.

Further proposals include an increase of the use of e-polling for the 2014 elections and ensuring intensified support by member states for voters who are nationals of other member states than their country of residence, trying to foster turnout and the transnational aspect of elections to the European Parliament.

An amendment of the 1965 Protocol on Privileges and Immunities of the European Communities with a view to establishing a uniform and supranational regime for Members of the European Parliament was at the end of his wish list in Draft Report I.⁵²¹

Although the first Report has been discussed in AFCO and at coordinators' meetings in the months of November and December 2008, the matter of European electoral reform did not get off the ground at the end of the last legislature ceasing in 2009, partly due to the Report's merits, partly due to the timing of the Report coinciding with the difficult ratification process of the Lisbon Treaty.

⁵²¹ European Parliament resolution of 6 July 2006 on modification of the Protocol on Privileges and Immunities, OJ C 303 E, 13.12.2006, p. 830, in which Parliament confirmed its intention to use the Members' Statute as a partial basis for the foreseen revision, European Parliament decision of 3 June 2003 on the adoption of a Statute for Members of the European Parliament, OJ C 68 E, 18.3.2004, p. 115.

Rapporteur Andrew Duff issued the second draft Report on 12 April 2010.⁵²² The Report is highly similar to its predecessor in structure, but adds the new results of the 2009 European Parliament elections with the distribution of seats of the 2009 - 2014 Parliament in Annex II of the Report,⁵²³ a new Annex IV on the development of gender imbalance in the European Parliament,⁵²⁴ and an updated Annex III on European Parliament voter turnout from three decades of European Parliament elections.

Most of the following amendments of the second draft Report to Articles of the 1976 Elections Act are identical to the ones in the precursor Report. Therefore, Duff Report II retains its character of a Rapporteur's wish list, with all elements that Duff felt to be realistic in the sense that they might either end up in an actual Report forwarded by Parliament to Council or as a bargaining mass. The setup of a European constituency, a second preferential vote for semi-open European party lists and a European electoral authority feature more prominently further up now in the new Report. As candidates from a third of member states would now be needed as a minimum to form a transnational political party list, established political parties and groups in the European Parliament could be more relaxed on competition from European splinter party groups and thereby making majority finding in the House easier. The promotion of e-polling is now 'accepted'⁵²⁵ in contrast to a Parliament which was 'determined' to maximise its use.⁵²⁶ As a new element, the second draft Report now '[u]rges States and political parties to

⁵²² Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, hereafter Draft Report II, 12.04.2010, 2010/xxxx/(INI).

⁵²³ Andrew Duff, Draft Report II, p 53.

⁵²⁴ Andrew Duff, Draft Report II, p 57.

⁵²⁵ Andrew Duff, Draft Report II, *op.cit.*, p 7.

⁵²⁶ Andrew Duff, Draft Report II, *op.cit.*, p 7.

promote the better representation of women and ethnic minority candidates both at the EU and national level'.⁵²⁷ Duff points towards differences in the systems used by the member states with regards to measures aimed at increasing the representation of women and ethnic minorities. The number of women MEPs in the current Parliament now stands at 35 %. As another argument to bring forward elections to May, Duff contends that this would give the EP a better opportunity to prepare for the election of the new Commission President.⁵²⁸ As a new element, the rapporteur introduces a concept to deal with future redistributions of parliamentary seats among States to take place on a regular basis in order to reflect demographic change in 'the resident populations of the States and to strictly respect the principle of degressive proportionality' by means of an 'agreement on an apolitical, mathematical formula which would respect the criteria laid down in the Treaties and spelt out in the Act'.⁵²⁹⁵³⁰ Duff underlines the perspective that the electoral system of the European Parliament is a compromise between the democratic principle of equality ('one man one vote') and the international law principle of equality among states, and that the Treaty lays down the principle of the equality of its citizens while forbidding discrimination on the grounds of nationality.⁵³¹ Duff envisaged implementation of his proposals in time for the 2014 elections.

Of the above named list, the single European constituency with transnational lists and the European electoral authority is of primary importance to the reform

⁵²⁷ Andrew Duff, Draft Report II, *op.cit.*, p 7.

⁵²⁸ Andrew Duff, Draft Report II, *op.cit.*, p 5.

⁵²⁹ Declaration No 5 annexed to the Final Act of the Lisbon Treaty IGC.

⁵³⁰ Andrew Duff, Draft Report II, *ibid.*

⁵³¹ Andrew Duff, Draft Report II, *op.cit.*, p 6.

proposals of Rapporteur Duff. In addition, Duff attempts to get the matter of the distribution of seats between member states off the bargaining table of intergovernmental conferences (IGCs) by means of a neutral mechanism. As a step towards a proportional distribution of seats, the Rapporteur endorses degressive proportionality. In the explanatory statement of Draft Report II, the rapporteur puts an emphasis on what he calls the ‘quest for degressive proportionality’.⁵³² The Treaty of Lisbon was not yet in force at the time of the 2009 elections. The Treaty of Nice formed the legal basis for these elections, 736 seats had to be allocated within a range of 5 to 99 seats per Member State. Duff realised that there would in any case, therefore, have to be a complete redistribution of seats during the 2009 - 2014 legislature to take into account the provisions of the Lisbon treaty as well as, as he argued, demographic change and the possible accession of new member states to the Union.⁵³³ When Croatia joins the EU during the 2009-14 parliamentary term in 2013, its seats will be added temporarily to the 751/754, as per the precedent of Bulgaria and Romania. An identical procedure would apply to Iceland.

Duff calls the principle of degressive proportionality an ‘elegant federalist concept’.⁵³⁴ He regards the merit of degressive proportionality to be that the interests of smaller minorities are protected by awarding the less populous States relatively higher representation than the more populous States.⁵³⁵ He continues to observe that ten member states deviated from that principle because they had either too many or too few Members of the European Parliament. After the 2009

⁵³² Andrew Duff, Draft Report II, *op.cit.*, p 38.

⁵³³ Andrew Duff, Draft Report II, *op.cit.*, p 38

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

elections there were still nine, only with the supplement of the 18 additional ‘Lisbon Treaty MEPs’, this number is lowered to five transgressions of the principle of degressive proportionality.⁵³⁶ The current distribution of seats is in the eyes of the Rapporteur a political fix which does not have the capability to react to demographic change in the member states.

Duff further makes the connection with the *Bundesverfassungsgerichts* so called Lisbon judgment. In his terms, the fact of the disproportionate underrepresentation of German citizens in the European Parliament formed part of the motivation of the plaintiffs who brought a case against the Lisbon treaty to the Court. After ‘a diverting discussion’⁵³⁷ of the merits of degressive proportionality, the Federal Constitutional Court concluded in its 2009 judgment that the system as proposed in the Treaty is acceptable because the EU falls short of being a federal state. The Court found that, in spite of the Union’s pretensions to European citizenship, the European Parliament would in fact be a representation of peoples linked to each other. The element of electoral equality would be missing when it comes to the European Parliament. Germany’s representation elsewhere in the government system of the Union would compensate for what might in other circumstances be considered an unfair treatment in the Parliament. Moreover, the Treaty contains optional instruments of transnational participatory democracy, such as the citizens’ initiative, which usefully complement the role of MEPs.⁵³⁸ Accepting the sensitivity of the matter of the composition of the European Parliament, Duff proposes to arrive at a mathematical formula, also to avoid litigation by the

⁵³⁶ Andrew Duff, Draft Report II, *op.cit.*, Annex II, p 53.

⁵³⁷ Andrew Duff, Draft Report II, *op.cit.*, p 39.

⁵³⁸ Federal Constitutional Court Judgment of 30 June 2009, especially paragraphs 279-297; http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

European Court of Justice.⁵³⁹

Another attempt to strengthen post-national democracy in the Duff Reports is encouraging member states to harmonise regulations on the removal of the franchise of expatriates and introducing reciprocal rights on a bilateral basis to vote in the respective national elections. So far, expats are allowed to vote in local and European elections only, but not in regional and national elections. With regards to expat voting, the Rapporteur goes through the option to extend the scope of EU law in a wide fashion to allow European citizens not only to vote in EP and local elections, but in regional and national parliamentary elections as well, in his second Draft report. Such a proposal, which would require a change of Article 22 TFEU, would in his view therefore need to be debated in a Convention.⁵⁴⁰ Duff proposes the preparation of the IGC on electoral reform by means of ‘a Convention charged to consider any item relevant to developing the legitimacy and efficacy of the European Parliament’.⁵⁴¹ Despite the difficult process that led to the Draft Treaty establishing a Constitution for Europe and the faltering ratification process of the Lisbon Treaty of that time, Duff chooses to follow the comprehensive Convention path - to get relevant actors involved into the electoral reform process, such as national governments and Parliaments, the Commission and MEPs that would play a major role in the ratification process. The Convention approach is dropped later on in the course of parliamentary debate.

⁵³⁹ Andrew Duff, Draft Report II, *op.cit.*, p 40.

⁵⁴⁰ Andrew Duff, Draft Report II, *op.cit.*, p 41.

⁵⁴¹ Andrew Duff, Draft Report II, *op.cit.*, p 8.

The focus of Duff's reform attempts further crystallised itself in the course of parliamentary debate. Whereas the first two drafts contained a variety of elements, which fall under the category of bargaining mass, for example a harmonisation of voting ages and preferential voting, following drafts continued to contain mainly the core elements.

Following two AFCO sessions on his second draft Report in May and June 2010 and several coordinators' meetings, Duff issued a new Report in November of that year, taking account of the results and encountered oppositions to his Report of these meetings.⁵⁴² In comparison to his second draft Report, which featured about all possible elements the Rapporteur deemed desirable, his third Report was far more streamlined. Only half the size of its predecessor, the Report contained in the following order

- the Motion,⁵⁴³
- the consolidated version of the 1976 Elections Act in prominent position,⁵⁴⁴
- followed by a new Annex on a proposal for an amendment of the Treaties, covering now the amendments to the Treaty on European Union and to Protocol (No7) on the privileges and immunities,⁵⁴⁵
- the draft proposal for a Council Decision adopting the provisions amending the 1976 Elections Act followed by the Draft Act

⁵⁴² Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report III, 05.11.2010, 2009/2134/(INI).

⁵⁴³ Andrew Duff, Draft Report III, *op.cit.*, p 3.

⁵⁴⁴ Andrew Duff, Draft Report III, *op.cit.*, p 8.

⁵⁴⁵ Andrew Duff, Draft Report III, *op.cit.*, p 14.

amendments,⁵⁴⁶

- and skipped everything else, broadly all Annexes, in particular the explanatory statement and all statistics in the Annexes,
- in particular by dropping the explanatory statement the rapporteur disposes off offensive language to less federally minded colleagues.

The new motion of Report III contains the European Parliament's Resolution of 6 May 2010 on the draft protocol amending Protocol No 36 on transitional provisions concerning the composition of the European Parliament for the rest of the 2009-2014 parliamentary term (Article 48(3) of the EU Treaty)⁵⁴⁷ and skips the call for a Convention on electoral reform, formerly point Z of draft Report II.⁵⁴⁸ Apart from these two elements, the introduction of the motion stayed virtually the same.

In comparison with what several colleagues in Parliament have considered an overloaded Draft Report II, Duff's way shorter third Report came along with a summary of a compromise proposal.⁵⁴⁹ Following extensive discussions with colleagues, the Rapporteur now suggests to focus Parliament's proposals on the following five elements:

1. transnational list 25 extra seats;
2. mathematical formula for the distribution of 751 seats;
3. new Commission proposal for revision of Directive 93/109;

⁵⁴⁶ Andrew Duff, Draft Report III, *op.cit.*, pp 18, 19.

⁵⁴⁷ The European Parliament's Opinion, texts adopted, P7 TA (2010) 0148.

⁵⁴⁸ Andrew Duff, Draft Report II, *op.cit.*, 'Z', p 6.

⁵⁴⁹ Andrew Duff, *Duff Report on Electoral Reform – Compromise Proposal*, 2010, p 1.

4. Protocol on Privileges and Immunities;
5. Moving election date from June to May.⁵⁵⁰

Accordingly he proposes to drop the following elements:

- Regional territorial constituencies for larger States;
- Preferential voting for national/regional constituencies;
- Minimum age;
- Extension of franchise in national parliamentary elections.⁵⁵¹

He suggests the following ‘optional extras’:

- Dual candidacies;
- E-polling;
- Limit polling to weekends.⁵⁵²

For Duff Report III, Parliament’s proposals have been reorganised, starting now off prominently with the European constituency with additional 25 MEPs coming from transnational party lists, a redistribution of the existing 751 seats according to a still to be found mathematical formula, its proposal to bring elections forward from June to May and the other elements of the compromise proposal.⁵⁵³ Accordingly, the elements of making regional constituencies mandatory for larger member states, preferential voting for national/regional constituencies, lowering

⁵⁵⁰ Andrew Duff, *Duff Report on Electoral Reform – Compromise Proposal*, *op.cit.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ Andrew Duff, Draft Report III, *op.cit.*, pp 6, 7.

the minimum voting age to 16 and an extension of the franchise in national parliamentary elections have been dropped.⁵⁵⁴ The ‘optional extras’ of the compromise proposal remain outside of the motion.

With regards to process, Duff proposes to drop the call for an immediate Convention on the grounds that, in the case of substantial cross-party agreement, an Intergovernmental Conference will suffice and be quicker. However, Parliament should hold in reserve the possibility of insisting on a Convention if needs be. In general, the author discovered reluctance among Duff’s colleagues on getting involved with the Convention process. After the Convention which led to the Draft Treaty establishing a Constitution for Europe and the troublesome ratification process which resulted in the Lisbon Treaty, putting across a Convention against the background of the debt crisis of several member states seemed inopportune.

The following first official Report basically contains the motion plus the three annexes with the consolidated version of the 1976 Elections Act, the proposal for an amendment of the Treaties and the draft Council Decision together with the provisions amending the electoral Act of the third Report⁵⁵⁵ and the explanatory statement and annexes thereto containing the Anastassopoulos Report, distribution of seats, European Parliament elections voter turnout, a graph on gender imbalance and a chart on the current electoral practice in member states in the same order as in the second draft Report.⁵⁵⁶ As a new addition, the successful

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Andrew Duff, Report IV/I, *op.cit.*, at pp 3, 9, 15, 19 and 20.

⁵⁵⁶ Andrew Duff, Report IV/I, *op.cit.*, at pp 32, 52, 54, 56, 57 and 58.

result of the final vote in AFCO on 19 April 2011 with a broad majority and the approval of 20 votes to four, no abstentions, is attached.⁵⁵⁷ However, some further contentual significant changes appear in this Report. In the Motion, AFCO proposes that

‘an additional 25 MEPs be elected by a single constituency formed of the whole territory of the European Union; transnational lists would be composed of candidates drawn from at least one third of the States, and may ensure an adequate gender representation; each elector would be enabled to cast one vote for the EU-wide list in addition to their vote for the national or regional list: voting for the EU constituency would be in accordance with the closed list proportional system; and seats would be allocated without a minimum threshold in accordance with the D'Hondt method^{558, 559}.

The European party lists are now supposed to be closed lists. Candidates would still need to be drawn from a third of the States, and no threshold would be allowed, but seats would be allocated in accordance with the D'Hondt method, despite the Sainte-Laguë producing more proportional results. Interestingly, this fact is still reproduced in a footnote to that part of the motion. The proposal of the D'Hondt method should therefore be regarded as a concession to the bigger political parties.

⁵⁵⁷ Andrew Duff, Report IV/I, *op.cit.*, at p 64.

⁵⁵⁸ The Sainte-Laguë method uses divisors of 1, 3, 5, 7, etc, and was used in the 2009 European elections in Germany, Latvia and Sweden. It produces a slightly more proportional result than the D'Hondt method.

⁵⁵⁹ Andrew Duff, Report IV/I, *op.cit.*, at p 7.

The explanatory statement of the second draft Report, dated April 2010, has been recycled for the fourth Report. Because of this, it still carries the demand for a Convention, for lowering the active voting right age, despite it may not be conducive to achieving the goal of increasing turnout but which, nevertheless, has ‘some intrinsic merit’⁵⁶⁰, of making regional constituencies mandatory for large member states, and of insisting on preferential voting.

The fourth Duff Report of April 2011, the first Report to make the step from draft Report to an official Report with a vote in AFCO and to be forwarded to a first and single reading in the chamber, is basically a compound of the content based on AFCO coordinators’ compromise of the third Report complemented by annexes and an explanatory statement of the second draft Report.⁵⁶¹ Therefore, the situation occurs that for example the proposals for mandatory constituencies and holding a Convention on electoral reform have been dropped in the amendments to the Elections Act, but suddenly reappear in the explanatory statement of this Report.

After the Report had been sent back to the drawing board at AFCO by group coordinators, with group debates on the electoral reform proposal having taken place only shortly before the EP’s session, Duff issued a fifth Report in September 2011. Officially called the ‘Draft Second Report’,⁵⁶² this fifth Report is basically an attempt to resume work on the electoral reform project and to revive or

⁵⁶⁰ Andrew Duff, Report IV/I, *op.cit.*, at p 49.

⁵⁶¹ Andrew Duff, Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0176/2011, 28.04.2011, Report IV/I (First official Report).

⁵⁶² Andrew Duff, Draft Second Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), 20.09.2011, Report V.

continue the debate in the parliamentary groups which started only shortly before the single reading in Parliament. The only sixteen pages long draft Report carries the motion and two annexes with the consolidated version of the 1976 Elections Act and a proposal for the amendment of Protocol No 7 on the privileges and immunities of the European Union.⁵⁶³ It does not contain proposals for amendments of the 1976 Elections Act, but Duff's core reform proposals are repeated in the Motion, in particular the introduction of transnational lists and the setup of a European electoral authority.⁵⁶⁴ It is left open whether these 25 Pan-European MEPs are to enter the House on top of the current number of seats or whether they are to be part of the current composition.

The motion of Report V refers to AFCO's previous Reports but remains in essence unchanged in comparison the previous drafts. The accession of Croatia figures more prominently as an incentive to pick up the matter of electoral reform on behalf of a necessary redistribution of seats. The transnational lists now figure in the federalist terminology of Pan-European lists in remembrance of the late Rudolf Dumont du Voitel, a prominent figure in the European movement, who died in August 2011. With regards to Pan-European lists, the new draft Report maintains that 'electoral equality must remain the overriding principle if pan-European lists are introduced; the status of Members in Parliament should therefore remain equal regardless of whether they are elected from pan-European, national or regional lists.'⁵⁶⁵ For colleagues without experience with MMP/TTD electoral systems, the rapporteur tries to reduce preconceptions about a different

⁵⁶³ Andrew Duff, Report V, *op.cit.*, at pp 3, 9 and 14.

⁵⁶⁴ Andrew Duff, Report V, *op.cit.*, at pp 6 and 7.

⁵⁶⁵ Andrew Duff, Report V, *op.cit.*, at p 6.

standing of parliamentarians coming from different tiers. The Report no longer talks about 25 additional seats, just about 25 MEPs. In translation, this means that these MEPs coming from Pan-European lists can also be a share of the existing 750+1 elected representatives. This is a crucial change to make these ‘new’ MEPs more acceptable against the background of the debt crisis, whereas the communication of additional MEPs has been considered as problematic among Duff’s colleagues in public debate.

With regards to concrete proposals of the motion, the Rapporteur sticks to Pan-European closed lists, tallied on the basis of the D’Hondt method. Hints in the footnotes towards the advantages of the Sainte-Laguë method are missing. Against the backdrop of the international debt crisis, the report acknowledges ‘the need to keep the cost of Parliament and its elections under review, and calls for these reforms to be implemented to a great extent within the present budgetary perspective’.⁵⁶⁶ As a further new element, the Report emphasises the need not only for national parties, but for Pan-European parties as well, to adhere to democratic principles in the selection of their candidates. For the use of active and passive voting rights with regards to expats, the suggestion of the Report’s predecessor of an abolition of the current information exchange system in favour of an electoral roll at EU level has been taken out.

Based on the draft fifth Report, AFCO tabled a second revised Report to the

⁵⁶⁶ Andrew Duff, Report V, *op.cit.*, at p 7.

chamber in February 2012.⁵⁶⁷ The sixth Report, officially the ‘Second Report’, carries the same elements as his draft predecessor V, with only smaller changes. The core elements have persisted in this last Report. It was adopted in AFCO by 16 to 7 votes, no abstentions. This sixth Report has been streamlined even further. It now carries the motion, a consolidated version of the 1976 Elections Act as the only Annex and two tables on procedure with regards to the Report and its referral back to the committee.⁵⁶⁸ The motion is virtually identical to the draft fifth Report. With regards to bringing elections forward from June to May, the motion now proposes to allow Parliament to determine the election date with a majority of its component members and approval of the Council.⁵⁶⁹ The emphasised adherence of political parties to democratic principles has been downscaled verbally to ‘all levels’ instead of ‘Pan-European and national’ levels.⁵⁷⁰

The tabled Report now calls for Parliament to instruct a European Parliament delegation, appointed by the Conference of Presidents and empowered with a clear mandate, to initiate a dialogue on electoral reform with the Council.⁵⁷¹ The core proposal of transnational or Pan-European lists is maintained. However, reluctance of political groups to initiate a reform which would require a Treaty change prevented a vote in Parliament. In the end, Parliament issued a Resolution on the elections to the European Parliament in 2014 with the aim of ‘reinforcing

⁵⁶⁷ Andrew Duff, Second Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-9999/2012, 01.02.2012, Report VI/II.

⁵⁶⁸ Andrew Duff, Report VI/II, *op.cit.*, at pp 3, 9 and 14.

⁵⁶⁹ Andrew Duff, Report VI/II, *op.cit.*, at p 7.

⁵⁷⁰ *Ibid.*

⁵⁷¹ Andrew Duff, Report VI/II, *op.cit.*, at p 8.

the political legitimacy of both Parliament and the Commission'.⁵⁷² The Resolution urges parties to nominate front-runners for the post of President of the Commission and expects them to play a leading role in the parliamentary electoral campaign.⁵⁷³ The European Parliament further calls for as many members of the Commission to be drawn from MEPs.⁵⁷⁴ To achieve gender balance in the Commission, Parliament asks member states to nominate both a female and a male candidate for the next Commission.⁵⁷⁵ In particular, Parliament urges member states to make use of their right under Article 3 of the 1976 Elections Act to establish legal thresholds to ensure a reliable majority in the House.⁵⁷⁶ The core proposal of transnational lists, which requires a Treaty change, is supposed to be picked up at the next Convention, likely to take place in spring 2015.

Andrew Duff follows a consensual democratic model in line with his federal vision of the European Union. He accentuates the values of fairness and equality, which he considers as essential for a transnational or post-national democracy. Within the continuum of free and fair elections, Duff holds that an electoral reform must not violate the principle of proportionality. In Duff's terms, such a form of a European democracy is allocated at the federal level of the European Union. With regards to his reform proposals, Duff has a preference for more uniform elements of electoral systems. Originally destined for the Convention route, Duff later on drops this suggestion against the background of the debt

⁵⁷² European Parliament Resolution of 22 November 2012 on elections to the European Parliament in 2014, P7-TA-PROV(2012)0462, B7-0520/2012, adopted by 316 votes to 90 with 20 abstentions, adopted by Parliament in single reading.

⁵⁷³ European Parliament Resolution, *op.cit.*, 1.

⁵⁷⁴ European Parliament Resolution, *op.cit.*, 2.

⁵⁷⁵ European Parliament Resolution, *op.cit.*, 3.

⁵⁷⁶ European Parliament Resolution, *op.cit.*, 4.

crisis. The key elements of his Reports are to be found in his compromise proposal, in particular

- the suggestion of transnational or Pan-European lists for 25 seats in Parliament, either as a top up to or as a share of the total number of seats,
- including the set-up of a European electoral authority;
- and a new method in the form of a mathematical formula for the distribution of seats.

Whereas the proposal for a mathematical formula fades away after the first official Report, the introduction of transnational lists for a single European constituency and the setup of a new European electoral authority persist through all six Reports. Making European parties more visible in EP election campaigns by presenting candidates for the office of Commission President maintains a core proposal of Parliament's 2012 Resolution, and European lists remain on the EP's agenda for the next Treaty Convention.

I shall investigate the translation of Duff's proposals into electoral law in the following final Section 3 of Chapter Four.

3. Differences compared to current system of electoral laws

In this Section, I shall turn to analyse how Rapporteur Duff's perception of the EU as a federal model and his transnational democratic approach translate into electoral law, showing differences of Duff's proposed amendments to the current system of electoral laws in the form of the 1976 Electoral Act. Duff's second

version of the first draft Report was far more elaborated than its predecessor and included a ‘Draft Council decision adopting the provisions amending the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976’,⁵⁷⁷ and a Draft Act amending the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976.⁵⁷⁸ This second version constituted the first draft Report by Andrew Duff which was presented to AFCO.⁵⁷⁹

Duff describes the necessary legal and constitutional changes to translate his Report into practice in Report II:

‘ (a) The introduction of an EU-wide list for 25 additional MEPs requires a change to Article 14(2) TEU via the procedures laid down for the ordinary revision of the treaty, namely a Convention followed by an IGC, with ratification by all the states.⁵⁸⁰

(b) Revision of the Protocol on Privileges and Immunities necessitates the same procedure.

(c) The redistribution of the 751 seats in time for the next elections requires a unanimous decision of the European Council on a proposal and with the consent of the Parliament.⁵⁸¹

(d) Other elements concerning the electoral procedure require a special law of the Council, acting unanimously, on a proposal and with the consent of Parliament, acting by an absolute majority of its Members, followed by the

⁵⁷⁷ Andrew Duff, Draft Report I, second draft version of 15.10.2008, 2007/2207(INI), p 9.

⁵⁷⁸ Andrew Duff, Draft Report I, second draft version, *op.cit.*, p 10.

⁵⁷⁹ Andrew Duff, Draft Report I, 15.10.2008, 2007, 2207 (INI).

⁵⁸⁰ Article 48(2), (3) and (4) TEU.

⁵⁸¹ Article 14(2) TEU.

endorsement by all national parliaments^{582, 583}.

According to Duff, the special legislative procedure may either take the form of an amendment to the 1976 Act, as is proposed in the Reports, or, alternatively, it may be thought more suitable for reasons of transparency to introduce a new protocol to the Treaties on the electoral procedure which would replace the original legislation and incorporate all the different elements of primary law discussed in the Reports. As Duff points out, once the basic reforms proposed are carried, implementing legislation will be required in due course, for example, to establish the new EU electoral authority. There will be budgetary consequences both for the EU and States as a result of these reforms.

In the Draft Act amending the 1976 Electoral Act,⁵⁸⁴ Duff proposes the following amendments:⁵⁸⁵

New Article 2b incorporates the key element of the Rapporteur's reform attempts, the creation of an additional European constituency.⁵⁸⁶ By introducing this new system of Two-Tier Districting into European elections, a number of MEPs

⁵⁸² Article 223(1) TFEU.

⁵⁸³ Andrew Duff, Draft Report II, *op.cit.*, p 49.

⁵⁸⁴ The amendments in this document are based on a consolidation produced by the Legal Service of the European Parliament on the basis of the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ L 278, 8.10.1976, p. 5, as amended by Decision 93/81/Euratom, CECA, CEE amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/CECA, CEE, Euratom of 20 September 1976, OJ L 33, 9.2.1993, p. 15, and Council Decision 2002/772/CE, Euratom of 25 June 2002 and 23 September 2002, OJ L 283, 21.10.2002, p. 1. This consolidation differs from the consolidated version produced by the Publications Office of the European Union, CONSLEG. 1976X1008-23/09/2002, in two respects: it incorporates an indent to Article 6(1) '– member of the Committee of the Regions' resulting from Article 5 of the Treaty of Amsterdam, OJ C 340, 10.11.1997, and is renumbered in accordance with Article 2(1) of Council Decision 2002/772/CE, Euratom.

⁵⁸⁵ For better readability, I constrain myself to present amendments of the Reports to the 1976 Elections Act within this text only insofar as they concern key reform proposals, such as the introduction of European lists. Further amendments can be found, wherever marked, in the Appendices at the end of this thesis.

⁵⁸⁶ Andrew Duff, Draft Report I, *op.cit.*, pp 12, 13.

equivalent to that of the number of member states, 25 at the time of the first Report, shall be elected in addition to the other 750 MEPs elected from their national or regional constituencies respectively, if coming from member states of more than 20 million inhabitants. The setup of a European Electoral Authority serves the purpose of a supranational monitoring system for European Parliament elections. An Implementation of a European Electoral office can be regarded as the next logical step of introducing a European constituency, but constitutes another key element or asset from the federal perspective: a first step of taking European Parliament elections from the member state level to the European or federal level. Due to the permanency of European institutions, the European Electoral authority would be there to stay. Article 2b, 4., contains provisions for the composition of European transnational party lists: these have to be compound of members coming from candidates resident in at least one quarter of member states – and balanced by gender. Otherwise, they would not be found eligible by the European electoral authority. By introducing these requirements, the Rapporteur tries to make his Report more capable of finding broad support in the chamber. Deputies from smaller member states would find it easier to agree to transnational lists if at least a quarter of candidates from member states had to be represented. On the other hand, smaller parties that are not present all over the Union would find it easier to come up with a combined list. The second list vote works via preferential voting within semi-open lists for a candidate from this European list. The rationale is to dramatise European elections in the eyes of electorates as Commission President candidates would most likely come from transnational lists, in the same way as heads of government following the Prime Minister or Federal Chancellor model are without standing directly for

government office in general elections. The use of the Sainte-Laguë method is supposed to underline the proportional character of European Parliament elections:

Amendment 5

1976 Elections Act Article 2 b (new)

'1976 Elections Act

Amendment

Article 2b

1. Without prejudice to Articles 2 and 2a, there shall be one additional constituency formed from the whole territory of the Union.

2. The total number of Members elected under the provisions of this Article shall be the same as the number of States.

3. An electoral authority shall be established to conduct and verify the electoral process of the European Union constituency. The authority shall comprise one representative of the European Parliament, the Commission and each Member State.

4. EU-wide lists submitted by the European political parties shall be deemed eligible only:

(a) if composed of candidates resident in at least one quarter of the States, and

(b) if balanced by gender.

5. Each elector shall have one supplementary vote that may be cast for his or her preferred candidate on the EU-wide list. Seats shall be allocated by the Sainte-Laguë method.

*6. Detailed arrangements for the European Union constituency election, including the delegation of powers to the electoral authority, shall be laid down in implementing measures to be adopted in accordance with Article 14.*⁵⁸⁷

Instead of candidates resident in at least quarter of member states for the European lists, a third of member states needs to be considered to form a transnational list according to Duff's Report II.⁵⁸⁸ This raises the stake for setting up a Pan-European list as a concession to established political party families among Europe, such as Social Democrats, Conservatives, Greens and Liberals.

As a standard in Two-Tier Districting systems, Duff intends to allow candidates to stand on both the European constituency as well as the regional constituency in one or several member states.⁵⁸⁹

To underline his transnational or pan-European approach, Duff chooses to take out hints towards a member state based conduct of European Parliament elections of the 1976 Elections Act.⁵⁹⁰ Interestingly, Duff apparently still allows the use of closed lists, but offering the possibility of the use of STV. He only clarifies this point in amendment 2, stating that lists shall be semi-open. Amendment 1 is further developed in Duff Report II: Duff here applies the Lisbon innovation of MEPs as representatives of the citizens of the Union instead of representatives of the citizens of the states brought together in the Community.

⁵⁸⁷ Andrew Duff, Draft Report I, *op.cit.*, pp 12, 13.

⁵⁸⁸ Andrew Duff, Draft Report II, *op.cit.*, p 13; Please refer to Appendix II, amendment 5, for further details.

⁵⁸⁹ Andrew Duff, Draft Report I, *op.cit.*, p 17; Please refer to Appendix I, amendment 14, for further details.

⁵⁹⁰ Andrew Duff, Draft Report I, *op.cit.*, p 10; please refer to Appendix I, amendment 1, for further details.

In his early Report, the Rapporteur introduces a new Article 2a to the 1976 Act with a view to incorporate a ceiling number of seats at 750, thereby getting rid of the extra seat.⁵⁹¹ The principle of degressive proportionality is supposed to be enshrined, with seats ranging from a minimum number of five seats to a maximum number of 95 seats. Under the new Article 2a, 2., Duff offers a definition of the principle of degressive proportionality in accordance with the Lamassoure-Severin Report. By incorporating this principle into the Act, he tries to make it impossible to deviate from this principle without being in breach of European primary law. Article 2a, 3. tries to subordinate the contentious matter of the distribution of seats, at current a permanent bone of contention at IGCs, to a system of continuous review. Acting on a proposal from the Commission and with assent from the House, any decision would need to be taken at least twelve months before the end of the legislature, avoiding any changes in the course of the mandate due to Treaty changes, as had happened with a new distribution of seats from Nice to Lisbon Treaty amendments. Amendment 4 of subsequent Report II allows for the size of the House to be 751, thereby now accepting the compromise of 750 + 1 for the President.⁵⁹²

Duff Report III of November 2010 incorporates the changes made by the Lisbon Treaty. Therefore, the amendments to the Treaties cover changed versions of TEU and TFEU. The Rapporteur translates his proposed amendments to the new constitutional framework as follows:

⁵⁹¹ Andrew Duff, Draft Report I, *op.cit.*, p 11; please refer to Appendix I, amendment 4, for further details.

⁵⁹² Andrew Duff, Draft Report II, *op.cit.*, pp 11, 12; please refer to Appendix II, amendment 4, for further details.

TREATY ON EUROPEAN UNION

‘Amendment A, Duff Report III

Treaty on European Union Article 14 – paragraph 2

Treaty on European Union

2. The European Parliament shall be composed of representatives of the Union's citizens. ***They shall not exceed seven hundred and fifty in number, plus the President.*** Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision ***establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.***

Amendment

2. The European Parliament shall be composed of representatives of the Union's citizens.

2a. There shall be seven hundred and fifty one seats allocated to constituencies established in the Member States. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The distribution of those seats among the States shall be reviewed regularly in accordance with a formula based on the total resident population of the States. Not later than twelve months before the end of the mandate of each Parliament the European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision ***on the redistribution of seats.***

2b. In addition, there shall be twenty-five seats allocated to a single constituency comprising the entire territory of the

The new amended Article 14 (2) TEU now contains the element of the European Parliament as the House of the Union's citizens. Paragraph 2a houses the fixed ceiling number of 751 seats, ranging from 6 to 96 per member state and taking into account the principle of degressive proportionality. A regular distribution of seats shall be based on a formula taking into account total member states' populations. Para 2b incorporates the 25 MEPs coming from a transnational constituency. This is followed by amendments to Protocol No 7 on the Privileges and Immunities of the European Union.

With regards to the amendments of the 1976 Elections Act, the third draft Report leaves out amendments in line with the above mentioned compromise proposal: amendments to Article 1, paragraph 2 (making semi-open lists mandatory), to Article 2 (making regional constituencies mandatory for member states with a population of more than 20 million), new Article 9a on an active voting right of 16, new Article 9b on dual candidacies for one or more member states plus a transnational list ('optional extra'), and Article 10, paragraph one (limits polling to weekends, optional extra) have been dropped.⁵⁹⁴

New Article 2a incorporates the proposal of a mathematical formula for a redistribution of seats taking into account the total resident population of member states as established by Eurostat. A formula for the distribution of the 751 seats in the European Parliament is supposed to be part of an Annex to new Article 2a

⁵⁹³ Andrew Duff, Draft Report III, *op.cit.*, p 14.

⁵⁹⁴ Andrew Duff, Draft Report III, *op.cit.*, pp 19, 24.

Elections Act. There is no laboured mathematical formula yet in the third Duff Report.⁵⁹⁵

In essence unaltered, but taking into account changes to the EU's constitutional framework, amended Article 2b contains the core project of Duff's reform attempts, the European constituency. The number of twenty-five additional MEPs coming from the European constituency no longer relates to the former corresponding number of member states:

‘Amendment 3, Duff Report III

1976 Elections Act Article 2 b (new)

1976 Elections Act

Amendment

Article 2b

1. Pursuant to Article 14(2b) of the Treaty on European Union, there shall be one additional constituency formed of the entire territory of the Union from which shall be elected twenty-five Members.

2. An electoral authority shall be established to conduct and verify the electoral process of the European Union constituency. The authority shall comprise representatives of the European Parliament, the Commission and each Member State.

3. Transnational lists of candidates for election in the European Union constituency submitted by the

⁵⁹⁵ Andrew Duff, Draft Report III, *op.cit.*, pp 19, 20; please refer to Appendix III, amendment 2, for further details.

European political parties shall be admissible only:

(a) if composed of candidates resident in at least one third of the States, and

(b) if balanced by gender.

4. Each elector shall have one supplementary vote that may be cast for his or her preferred candidate on the European Union-wide list. Voting shall be by the preferential semi-open list system. Seats shall be allocated in accordance with the Sainte-Laguë method.

5. Detailed arrangements for the European Union constituency election, including the delegation of powers to the electoral authority, shall be laid down in implementing measures to be adopted in accordance with Article 14.⁵⁹⁶

First official Report IV/I adds a new amended paragraph 2 to the new Article 2a, regulating the cases in which seats for new member states need to be added to the House during a running legislature.⁵⁹⁷ The experience with MEPs from the new member states of Bulgaria and Romania is supposed to become the general rule, to be applied, for example, to the cases of Croatia and Iceland. The paragraph on a mathematical formula of the November 2010 draft Report has been replaced here. European party lists are now supposed to be closed lists.⁵⁹⁸ Candidates would still need to be drawn from a third of the States, and no legal threshold would be allowed. With paragraphs 1, 3 and 5 of the new Article 2b remaining unchanged,

⁵⁹⁶ Andrew Duff, Draft Report III, *op.cit.*, pp 20, 21.

⁵⁹⁷ Andrew Duff, Report IV/I, *op.cit.*, at p 21; please refer to Appendix IV, amendment 2, for further details.

⁵⁹⁸ Andrew Duff, Report IV/I, *op.cit.*, at pp 21, 22.

paragraph 2 ensures Parliament's stake in setting up the European Electoral authority by codifying the ordinary legislative procedure, formerly known as the codecision procedure, as the relevant mechanism. Paragraph 4 enshrines closed lists for the European constituency, however refers to the Sainte-Laguë method, despite D'Hondt being used in the motion, footnoted with the blessings of Sainte-Laguë:

‘Amendment 3

1976 Elections Act Article 2 b (new)

1976 Elections Act

Amendment

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish an electoral authority to conduct and verify the electoral process of the European Union constituency.

4. Each elector shall have one supplementary vote that may be cast for the European Union-wide list. Seats shall be allocated in accordance with the Sainte-Laguë method.’⁵⁹⁹

Due to the proposed TTD system, every voter in European Parliament elections would have two votes, one for the national respectively regional constituency, and

⁵⁹⁹ Andrew Duff, Report IV/I, *op.cit.*, at pp 21, 22.

a second vote for the European party list of the European constituency.⁶⁰⁰ The Rapporteur tries to create a *sine qua non* for being able to conduct European elections by the new European electoral authority, and a European electoral register.⁶⁰¹ In case of an impossibility to hold elections, Duff envisages the necessity of Parliament's consent, instead of simply being consulted, to determine another electoral period.⁶⁰²

Next to Duff's key proposals, several other elements kept reoccurring. The amended Article 3 continues to allow the use of legal minimum thresholds for the first vote, adapting this rule to the circumstances of national, regional and linguistic constituencies. At member state level, this threshold may not exceed five per cent.⁶⁰³ With regards to the second vote, the Duff Report foresees no legal threshold. The waiver of a legal threshold would make it easier for smaller parties to agree to the concept of transnational lists and underlines the core concept of proportional representation. Amendment 6 of Duff Report II has deleted the possibility of linguistic constituencies from the amended Article 3 of the first draft Report.⁶⁰⁴ The element of regional, linguistic constituencies has always been a contentious issue for larger member states, particularly for Spain, with regards to its three historic regions, Catalonia, Galicia and the Basque country and their wishes for greater independence.

⁶⁰⁰ Andrew Duff, Draft Report III, *op.cit.*, p 24; please refer to Appendix III, amendment 11, for further details.

⁶⁰¹ Andrew Duff, Report IV/I, *op.cit.*, at pp 24, 25; please refer to Appendix IV, amendment 11, for further details.

⁶⁰² Andrew Duff, Draft Report I, *op.cit.*, pp 17, 18; please refer to Appendix I, amendment 14, for further details.

⁶⁰³ Andrew Duff, Draft Report I, *op.cit.*, p 13; please refer to Appendix I, amendment 6, for further details.

⁶⁰⁴ Andrew Duff, Draft Report II, *op.cit.*, p 13.

By a proposed amendment to Article 1, paragraph 2, Duff intends to abolish the use of closed lists, making the use of semi-open lists compulsory.⁶⁰⁵ This method allows the electorate to change the order of candidates within a given party list. This system is in use, for example, in Austria for elections to the European Parliament. By giving voters more of a choice, the Rapporteur's intend is to encourage voters to vote and stimulate turnout. Political parties' absolute control over candidate nominations is counteracted. This proposal has been rendered in Report III in accordance with the compromise proposal.

The same faith awaited the proposal for a mandatory introduction of regional constituencies. Whereas the 1976 electoral Act in its current amended form leaves the establishment of constituencies optional, the Rapporteur sought to make the creation of regional constituencies mandatory in his early Reports in Article 2, subparagraph 2, for member states of a population of more than 20 million.⁶⁰⁶

Duff further intended to incorporate the new Members' Statute of the European Parliament, one of the projects that brought the European Parliament closer to the practice of national parliaments with respect to the rights of parliamentarians, their parliamentary allowances and MEPs' assistants' conditions.⁶⁰⁷

The Rapporteur also added the mandate of a national or regional parliament to the list of incompatibilities with the office of member of the European Parliament. At the same time, amendment 11 deletes Article 7 Paragraph 2 Elections Act which declared membership of a national parliament to be incompatible from the 2004 EP elections onwards and deletes exceptional derogations from that rule for UK

⁶⁰⁵ Andrew Duff, Draft Report I, *op.cit.*, p 10; please refer to Appendix I, amendment 2, for further details.

⁶⁰⁶ Andrew Duff, Draft Report I, *op.cit.*, p 11; please refer to Appendix I, amendment 3, for further details.

⁶⁰⁷ Andrew Duff, Draft Report I, *op.cit.*, pp 14, 15; please refer to Annex I, amendment 9 for further details.

and Irish deputies.⁶⁰⁸ Members of parliaments without any legislative powers would still be permitted to hold their office together with their European mandate. Further amendments to the 1976 Elections Act included the verification of MEPs' credentials,⁶⁰⁹ the filling of vacancies,⁶¹⁰ campaign expenses,⁶¹¹ allocating the sole authority on an interpretation of the Elections Act at the European Parliament itself,⁶¹² and determining the length of the electoral period.⁶¹³ The newly amended Article 11 paragraph 1 obliges Parliament and Council to determine the electoral period at least two years instead of one before the end of the parliamentary term.⁶¹⁴ Apart from the above mentioned changes, the first official Report replicates its predecessors' amendments. Amendment 22 reshuffles the pattern of force with regards to implementation measures of the Act. A qualified majority is supposed to suffice, Parliament would have the right of initiative and would need to give its assent to any adopted measures of the Council after the Commission has been consulted.⁶¹⁵ In the old version, Article 14 only demanded of the Council to endeavour agreement with Parliament. The amended version foresees Parliament in the driving seat. Report III makes competences of member states and the European electoral authority clearer with regards to campaign expenses. Whereas member states have the right to set a maximum for candidates at the regional as well as the national level, the yet to be founded European electoral

⁶⁰⁸ Andrew Duff, Draft Report I, *op.cit.*, p 15; Andrew Duff, Report IV/I, *op.cit.*, at p 23; please refer to Appendix I, amendment 10, and Appendix IV, amendment 8, for further details.

⁶⁰⁹ Andrew Duff, Draft Report I, *op.cit.*, p 18; please refer to Appendix I, amendment 17, for further details.

⁶¹⁰ Andrew Duff, Draft Report I, *op.cit.*, pp 19, 20; Draft Report III, *op.cit.*, pp 27, 28; please refer to Appendix I, amendments 18, 19 and 20, and Appendix III, amendment 17, for further details.

⁶¹¹ Andrew Duff, Draft Report I, *op.cit.*, pp 13, 14; Draft Report III, *op.cit.*, p 22; please refer to Appendix I, amendment 7, and Appendix III, amendment 5, for further details.

⁶¹² Andrew Duff, Draft Report I, *op.cit.*, p 21; please refer to Appendix I, amendment 21, for further details.

⁶¹³ Andrew Duff, Report IV/I, *op.cit.*, at p 25.

⁶¹⁴ Andrew Duff, Report IV/I, *op.cit.*, at p 25.

⁶¹⁵ Andrew Duff, Draft Report I, *op.cit.*, p 21; please refer to Appendix I, amendment 22, for further details.

authority shall set a limit for European parties and candidates of the second tier. Shortening polling period to two days and bringing elections forward to May are further attempts of greater harmonisation of electoral laws.⁶¹⁶

Proposed amendments underline the Rapporteur's intent to strengthen a European democracy by means of a European constituency with European lists and a European electoral authority. Elements in the Reports provided next steps in achieving greater uniformity. Draft Report V and Report VI/I did not contain any amended versions of the Elections Act, but retained all elements in their motions and explanatory statements. Although these six Reports have undergone transformation in the course of debate in Parliament, the core element of European lists has been more resistant to change and persisted, with smaller changes, throughout Reports.

Conclusion

Chapter Four has investigated the federal model Rapporteur Duff applies to the EU and which manifests itself in the reform proposals. He intends to introduce elements of transnational democracy to the consensual democratic model of the European Union. Key proposal of all Reports is the introduction of a new Article 2b, amending the 1976 Elections Act by introducing transnational lists, with 25 MEPs elected from a European constituency, and a European electoral authority.

As Chapter Four has been concerned with an assessment of Duff's Reports, Chapter Five will continue on the matter of electoral reform by analysing

⁶¹⁶ Andrew Duff, Draft Report I, *op.cit.*, p 21; please refer to Appendix I, amendment 15, for further details.

responses of various actors to the Duff Reports and by assessing models reflected in those positions. Based on findings of this thesis, Chapter Six then presents core elements of an ideal type electoral system to remedy the European democratic deficit which exists first and foremost under the federal model.

CHAPTER FIVE

THE DUFF REPORTS UNDER SCRUTINY: ANALYSIS OF RESPONSES TO DUFF'S PROPOSALS AND ASSESSMENT OF MODELS REFLECTED IN THOSE RESPONSES

Introduction

This chapter has the objective to move on from the historical analysis presented in Chapter Three and the analysis of current developments in the field of electoral reform in Chapter Four and to consider more recent debates, for the most part prompted by the Duff proposals. Of course, as the analysis of electoral systems and their political implications developed in Chapter Two would suggest, many of the reactions to Duff reflect differences over their proponent's underlying vision or model of democracy as much as technical disagreements about the electoral system, narrowly defined. Different models of the EU further amplify diverging positions on the need for and the details of electoral reform.

In the first Section, I shall assess the different positions to Duff's proposals and the theoretical framework reflected in those responses, in particular the model of the EU according to supporters and counterproposals. Different positions on the European integration process shall be analysed by the help of the matrix of the European Union as an international organisation, as a supranational technocratic regime and as a federal model. Section 2 shall then analyse the different democratic visions as well as diverging models of the EU that manifest themselves in actors' points of view. Further to theoretical foundations, technical differences on the details of electoral reform shall be revealed.

Interviews with actors are an essential part to find out what actors are doing, why they are doing this, and especially to analyse which models (if any) these actors have in mind when they are pursuing or opposing electoral reform. This is complemented by the following of current events in AFCE, the European

Parliament's Constitutional Affairs Committee, and in the chamber itself. The author has conducted interviews with AFCO coordinators of all of the political groups in the European Parliament, with shadows of the Duff Reports as well as with its critics. Due to a time span from the first draft Report in late 2008 to the sixth and last Report in February 2012, this thesis captures the latest developments reflecting on the most recent events in the field of electoral reform in the European Parliament.

A first meeting and a semi-structured interview with Rapporteur Duff was conducted in June 2008. In February 2009, this was followed by an interview with Richard Corbett, MEP in the last legislature and coordinator for the PES in the Constitutional Affairs Committee at that time. A further meeting took place with Martin Schulz, chairman of the S&D group in the European Parliament at the time of meeting and current President of the House, in May 2009 during the campaign for the new Parliament. In the crucial period of time after the third draft Report had been issued and during the run-up to Rapporteur Duff's first official Report,⁶¹⁷ I conducted semi-structured interviews with AFCO coordinators and shadows of the EP's political groups in the months of November and December 2010 to find out about different approaches in Parliament to address the democratic deficit by means of electoral reform. Interviews provided information on latest developments in this field, about conforming and differing views in the House. As it is beyond the limits of this thesis to interview a larger share of

⁶¹⁷ Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report III, 05.11.2010, 2009/2134 (INI); Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), A7-0176/2011, 28.04.2011, Report IV/I (First official Report).

Parliament's component Members, I have attempted to speak to a variety of actors as representative for the range of opinions as possible. In particular, AFCO coordinators were useful sources in that respect, but other Members of Parliament with expertise and long-year dealings on this subject were equally helpful.

Apart from the Members of Parliament already mentioned above, my interviewees included:

- Mr Íñigo Méndez de Vigo of the EPP group, AFCO coordinator for the EPP,
- Mr Helmut Scholz, MEP, Confederal Group of the European United Left – Nordic Green Left, AFCO coordinator for his group and shadow of the Report,
- Mr Ashley Fox, MEP, European Conservatives and Reformists Group, ECR AFCO Coordinator,
- Mr Morten Messerschmidt, MEP, Europe of Freedom and Democracy Group, AFCO Coordinator,
- Mr Enrique Guerrero Salom, MEP, Deputy Parliamentary Group Leader of the S&D Group, S&D AFCO Coordinator, and
- Professor György Schöpflin of the EPP group, shadow of the Duff Report for the EPP.

Next to my mentioned interview partners, numerous telephone conversations with the respective offices and with political advisors in the Rapporteur's office as well as other offices in particular have helped me analysing the range of positions in the European Parliament.

Furthermore, I have followed developments in the in charge Constitutional Affairs Committee during that entire period, in particular at the Committee's meetings on 4 May and 2 June 2010, at a combined meeting of AFCO and MPs from national parliaments on 30 September of that year, during the AFCO sessions of 30 November 2010, 7 February and 15 March 2011, the AFCO vote on 19 April 2011, AFCO session on the 25th and vote and adoption on Report VI/II on the 26th of January 2012. I have also followed the sitting of the European Parliament of 7th July 2011 on the Duff Report. The author attended nearly all of these meetings in person on location, and in case this was not possible due to logistical circumstances, via webstream online. Next to Committee sessions, I have followed the coverage of reform attempts, the Press Conferences in the EP such as Duff's on 6 July 2011, and publications on the reform proposals.

I shall start off by analysing the model of the EU among MEPs in the European Parliament, before turning to investigate associated democratic models and proposals for elements of the electoral system.

1. Model of the EU according to Supporters and Counterproposals

When the Rapporteur introduced his Report to AFCO for the first time on 4 May 2010, Duff drew on the matters of legitimacy and popularity of the European Parliament: a decline in voter turnout raised concerns about the process of post-national democracy.⁶¹⁸ Despite the fact that his federal model of the European Parliament as the central legitimating mechanism is shared among many in the European Parliament, it is also heavily contested.

⁶¹⁸ Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

Others as Ashley Fox have the political objective that there should be no further integration. Federalists, on the other hand, Fox insisting of using it as a pejorative term, despite the fact that they would celebrate the use of the word, wanted to progress towards a United States of Europe.⁶¹⁹ Despite it being an honourable goal, it was one that he profoundly disagreed with. As a Conservative, he thought that first government should be limited and second, we should go with our traditions. The nation state was an expression of national tradition.⁶²⁰ Despite his intergovernmental model, viewing the European Union as an international organisation, the existence of Parliament is not redundant in Fox's regard. He sees a role for Parliament in holding the executive, the Commission, to account, and in its representational role. National parliaments, despite being far more important in legitimising the European Union, could not fulfil this function because national politicians were not interested in Europe.⁶²¹ Fox is joined in his rejection of the federal model by Morten Messerschmidt. However, Messerschmidt sees the intergovernmental model on the losing side in the integration process and suggests a stronger involvement of national parliaments to remedy the democratic deficit: The nation states were cheated every day by the more federal institutions in the European Union, the Commission and the Parliament. In his assessment, the Council was the weakest institution in the framework of the Union: the real decision-makers of the Council were only in Bruxelles for two or three days a month, whereas Commission and Parliament were at the scene constantly.⁶²²

⁶¹⁹ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 06:57.*

⁶²⁰ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 07:27.*

⁶²¹ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 15:00.*

⁶²² *Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 01:22.*

There was a structural deficit, which was the reason why member states were on the losing side on a daily basis. Accordingly, Messerschmidt preferred a much stronger influence of national parliaments, like in the COSAC structure, may be as a second chamber to the European Parliament.⁶²³ Low turnouts in EP elections were basically a quality check for the European Parliament, telling the chamber if citizens thought if the EP was something for them.⁶²⁴ A more important point was that if people had any idea what the federal sentiment in the European Parliament was, they would be shocked.⁶²⁵ There would be a rebellion against the component parties of the groups in the EP if people found out what they were thinking about institutional reform. Proponents of the international organisation model see an only limited role for the European Parliament, and national parliaments and governments as the decisive legitimating mechanisms.

Other colleagues describe the EU as an ambiguous entity, supranational, but not entirely, as a regulatory, but also political body and at the same time highly technical.⁶²⁶ Some describe the EU as a *sui generis* formation, in the middle of an International Organisation and a Federal State. The simultaneous developments of enlargement on the one side and institutional and constitutional reform on the other make a clear perception of the nature of the EU more difficult.⁶²⁷ Along the line of the *Bundesverfassungsgerichts* 'Lisbon judgment', some regard the EU, in

⁶²³ Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 02:01.

⁶²⁴ Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 05:49.

⁶²⁵ Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 05:58.

⁶²⁶ Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 29:30.

⁶²⁷ Interview with Mr Enrique Guerrero Salom, MEP, Deputy Parliamentary Group Leader of the S&D Group, S&D AFCO Coordinator, 14 December 2010, answers sent in writing.

its current state, as a *Staatenverbund*, but do not believe it is further yet. If, against the background of the economic crisis, Europe managed to preserve its current state of a *Staatenverbund*, a lot would be accomplished for Europe. Despite the fact that he preferred to talk about chances instead of obstacles, Mr Helmut Scholz does not see a window of opportunity at present for further integration.⁶²⁸ There would be ramifications of the crisis on the electoral reform process. The only chance was a decision on the installation of an economic government and to use this opportunity to work off other matters such as electoral reform at the same time at an IGC. For the reform process, he preferred the Convention method, but did not see any willingness anywhere. There was a fear among national governments that too many matters would end up at the bargaining table. He saw the Europeanisation of politics as indispensable, but did not see any chance for this project at the moment. Many power elites on the national level were not willing to go this next step because this meant a lack of power at the national level. That was the nub of the matter.⁶²⁹ In general, there was an underdeveloped discourse on the future of Europe.

Actors do not always use definitions of the European Union in a more consistent academic form, but, for example, combine elements of different models. Whereas the European Union is regarded as an international organisation or as federal, it is also considered a supranational political body and at the same time a regulatory technocratic regime. Others inherit definitions such as that of a *Staatenverbund*. However, concerns about the EP's democratic legitimacy and a democratic deficit

⁶²⁸ Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 11:06.

⁶²⁹ Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 14:33.

were shared by several colleagues. Democracy was a *raison d'état* for the European Union, parliamentary representative democracy was the very basis for Europe.⁶³⁰ Mr Ramón Jáuregui Atondo, MEP, in line with the German Federal Constitutional Court, questioned the element of the equality of the vote and held that elections to the chamber were not conducted under the motto of 'one man, one vote'.⁶³¹ Strong support for the idea of European lists derived out of the motivation to 'increase the visibility of Parliament'.⁶³² Something needed to be done to overcome voter fatigue and disenchantment with European politics.⁶³³

As Prof. Schöpflin, MEP, has held, there is a disconnect between European citizens and the EU, also due to the fact that there is a disconnect between European elites and the EU.⁶³⁴ A '*Verfassungspatriotismus*' simply does not exist at the European level – because the member states do not want it. As Mr Schöpflin elaborated, Symbols are an important means of enhancing identification. That was why the British and the Dutch had been so keen on deleting European symbols from the Lisbon text. The European Union has no control over its own legitimation. Member states do lose control when they enhance legitimation of the European Union. At current, member states only went to citizens to claim 'we have won something', and blamed it on European institutions 'when we lose something'. In the European Parliament it is felt that

⁶³⁰ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 19:28.*

⁶³¹ Ramón Jáuregui Atondo, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform.*

⁶³² Zita Gurmai, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform.*

⁶³³ *Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 00:47.*

⁶³⁴ *Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 01:36.*

legitimation through the European Parliament is very weak, and legitimation through member states does not work.⁶³⁵ It is also suggested to bring the European Union down to the nation state, the Commission having dependences in the member states, introducing local Commissioners etc., with open forums and offices acting as the first stop for citizens, in the sense of Lenin's dual power, bridging the legitimation gap.⁶³⁶ The question was how to get EP elections out of the national context and elevate them to the European level.⁶³⁷ Power on the European level is a fact and it is executed. That power is floating above national governments, but a legitimating factor is missing. If one shared the belief that Europe should speak with one voice, or to say the same things at least, one needed to create places where this common voice, or the same speech, is composed.⁶³⁸ The approach was pure 'Monnetism': if you worked together, at the end of the day, it would work out fine. To Mr Íñigo Méndez de Vigo the term 'federal' meant 'decentralised', for the British, it meant the exact opposite: centralised.⁶³⁹ Every time he started talking about European values, his British colleagues were against it because they claimed these did not exist. In reality, they were talking about the same things. He therefore had never been interested in the label of the integration model. One possible way of finding a consensus were the European political parties.

⁶³⁵ *Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 05:55.*

⁶³⁶ *Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 34:10.*

⁶³⁷ *Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 03:56.*

⁶³⁸ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 13:12.*

⁶³⁹ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 13:48.*

Among actors intending to bridge the legitimization gap, it is a widely held belief in Parliament to remedy the democratic deficit by increasing drama in EP elections and lifting awareness of European elections. Therefore, political parties should put forward candidates for the post of President of the Commission for the 2014 European Parliament elections.⁶⁴⁰ However, with regards to low and declining turnouts, it is argued that there are many reasons why people abstained from voting, some did not feel represented etc., but the engagement with democracy had fallen in general in the last decade. Low turnouts were not a European issue as such but a general problem which was aggregated in the European elections due to the absence of drama and a lack of competition. In Spain, for example, all parties were pro-European, as well as all main parties in Germany, apart from *Die Linke*, the same with France.⁶⁴¹ Some did not see a problem with the legitimacy of the European Parliament, as every citizen had the opportunity to take advantage of his or her right to vote.⁶⁴² However, abstention was an expression of discontent with the image of EU institutions in general.

Others found Duff's Reform project to be overall unrealistic, because the proposals required a Treaty change and there was a certain fatigue among Member States for change.⁶⁴³ The success of any reform proposal depended on the member states.⁶⁴⁴ Confirming Reif and Schmitt's Second Order National

⁶⁴⁰ Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 10:34.

⁶⁴¹ Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 09:20.

⁶⁴² Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 02:22.

⁶⁴³ Jaime Mayor Oreja, Enrique Guerrero Salom, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁴⁴ Enrique Guerrero Salom, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

Elections model, so far, elections to the European Parliament had been national elections with national topics, garnished with a little bit of Europe. Actors, institutional players were the national parties, with national power elites, that eventually delegate the one or the other politician to the EU, but it was the national consideration, national consensus, to transfer certain elements to the EU level, and this needed to be changed.⁶⁴⁵

The range of classifications of the European Union among Parliamentarians is as wide as it could be. Whereas eurosceptics treasure the nation state and advocate the international organisation model, integrationists describe the model of the EU as an ambiguous entity, as a *Staatenverbund*, a form of organisation *sui generis*, supranational and highly technical, regulatory, but also as a political organisation, as federal. As manifold as these descriptions may be, it has to be kept in mind that actors in Parliament do not necessarily use these terms as they developed in academia and case law. Despite the existence of intergovernmentalist views, there exists a federal impetus in the chamber, and the battle line is not between left and right, but between integrationists and eurosceptics within the five major political groups. Knowingly as well as unknowingly, models of integration used by MEPs range from that of an international organisation to a federal model, including elements of functionalist and governance approaches. Among directly elected parliamentarians, however, supranational and technocratic elements are recognised, but not endorsed. Usually, models are not used in their pure form, but are partly overlapping. For example, even Mr Fox sees as role for the European Parliament, despite his strong intergovernmentalist view. Others, such as Mr

⁶⁴⁵ *Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 05:18.*

Scholz and Prof. Schöpflin, despite functionalist and governance elements in their approaches, have a federal bias and endorse further integration, also in the field of electoral reform, and see the European Parliament as a central mechanism of legitimation. The next section analyses how differing models of the European Union in the European Parliament translate into electoral reform proposals.

2. Democratic Models and Corresponding Electoral Systems of Supporters and Counterproposals

With regards to concrete steps in electoral reform, next to the key proposal of transnational or Pan-European lists and the set up of a European electoral authority, several other technical aspects were part of the debate, such as the distribution of seats among member states, regional constituencies, preferential voting, polling days, gender balance in Parliament, voting age and standards for European parties. However, transnational lists and an objective distribution of seats between member states were the central proposals of Duff's Reports and the cause of fierce debates.⁶⁴⁶ In more general terms, the dimension of an attempted reform has been debated. For example, the Report has been considered to be overambitious because some aspects such as a change in voting rights required constitutional changes and even referenda at national level. A focus on common principles has been preferred,⁶⁴⁷ striking the balance between a uniform system

⁶⁴⁶ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 10:39.*

⁶⁴⁷ Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform.*

and common principles.⁶⁴⁸ Instead of a ‘take it or leave it’ strategy, following a small step approach has been considered as beneficial.⁶⁴⁹

Mr Morten Messerschmidt argued that the current system for elections to the European Parliament did not work, but changing it would not make the situation any better, definitely not if changes were to come from this House.⁶⁵⁰ In Messerschmidt’s view, the European Union used to be a practical arrangement between sovereign states, but now it had turned into an inefficient burden, sucking up all democracy and destroying the possibility for Europe to survive in the new century. There was no non-national democracy, and according to his intergovernmentalist view, Messerschmidt denied the need for a reform of the electoral system for EP elections and considered any such step as counterproductive.⁶⁵¹

As the Rapporteur expected, the greatest controversy developed on the matter of a single European constituency with transnational lists. Under his proposal, each voter would have two votes: One for the regional or national constituency, and one for the Pan-European constituency. Duff sees the need for the set-up of a European electoral authority to conduct Pan-European elections, to overview the financing, selection and order of candidates.⁶⁵² He justified the proposal of a

⁶⁴⁸ Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁴⁹ Enrique Guerrero Salom, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁵⁰ *Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 00:22.*

⁶⁵¹ *Interview with Mr Morten Messerschmidt, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 07:52.*

⁶⁵² Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

European constituency: an effort needed to be made to oblige European political parties - which were hardly more than conference organisers at the moment - to select candidates, transforming his postnational democratic model into a concrete proposal. This would bring a qualitative change for elections to the European Parliament, for competition among parties, for press coverage, and for the public interest in European elections. Candidates on European lists would be made of “political celebrities”. The proposal of a European constituency would challenge national political parties in their dominance. A Pan-European constituency was necessary due to the federal structure of the European Union. The defence of national dominance in European elections had to be challenged.⁶⁵³ As the previous Chapter Four has shown, this proposed amendment to the Elections Act remained the core proposal in all six Reports and has found broad support in the Committee.⁶⁵⁴

For the Commission, Mrs Maria Damanaki quoted an extract from a Communication of the Commission forwarded to the Convention on a Constitution in Europe in 2002: ‘Looking ahead, the Commission confirms that the Union would greatly benefit if a number of Members of the European Parliament were elected from European lists submitted to the whole of the European electorate.’⁶⁵⁵ The Commission maintained that European lists would

⁶⁵³ Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁵⁴ *Interview with Professor György Schöpflin, MEP, European Parliament, Bruxelles, 8th of December 2010, at minute 09:50; Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 13:12; Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 08:17; Enrique Guerrero Salom, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.*

⁶⁵⁵ European Parliament, *Plenary Session of the 7th of July 2011, op.cit.*, Maria Damanaki at time 10:03.43.

help to enhance the transnational character of European elections.⁶⁵⁶ Only if every European citizen could vote for European lists, and that was what the Federal Constitutional Court demanded, genuine legitimacy of the European Parliament was possible. To meet demands of the smaller member states, MEPs suggested extending the number of MEPs elected from transnational lists to ten percent of the overall number. Mr Verhofstadt had made the same suggestion.⁶⁵⁷ According to Mr Scholz, all major parliamentary groups were split on the matter of transnational lists. ECR and EFD were strictly against it.⁶⁵⁸ The divide within parliamentary groups went strictly along the line between intergovernmental oriented or Community oriented, federal minded colleagues. To different degrees, this divide existed in all parliamentary groups. As a determining factor for the differing views, he perceived the views of the different national political parties, of which EP groups are composed, to be decisive.⁶⁵⁹

Scepticism towards European lists derived from the fact that such lists would require a Treaty change,⁶⁶⁰ but also, already in the Committee the opinion was rendered that some member states could not accept such an innovation because a Pan-European constituency changed national influences in the European Parliament.⁶⁶¹ Distribution of knowledge among actors has proven as another problem in the discussion on electoral reform next to the use of different models.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ European Parliament, *Plenary Session of the 7th of July 2011*, *op.cit.*, Alexandra Thein at time 10:17.01.

⁶⁵⁸ *Interview with Mr Helmut Scholz, MEP*, European Parliament, Bruxelles, 30th of November 2010, at minute 18:15.

⁶⁵⁹ *Interview with Mr Helmut Scholz, MEP*, European Parliament, Bruxelles, 30th of November 2010, at minute 19:32.

⁶⁶⁰ Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*; *interview with Richard Corbett, MEP*, European Parliament, Bruxelles, 10th February 2009; *interview with Martin Schulz, MEP*, Aachen, 2nd May 2009.

⁶⁶¹ Jaime Mayor Oreja, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

Even at the day of the AFCO session on 30 November 2010, a spokesman of a political party did not understand what the concept of transnational lists meant and did not make the connection between lists and European political parties. Mr Méndez de Vigo realised when he heard that colleague talking that there was a problem of comprehension and explanation in the House as well.⁶⁶² Moreover, as has become evident in a common session of AFCO and national MPs, there is a certain hostility from some national MPs, who see their role in the integration process threatened. Against the background of the debt crisis, despite not formally opposing transnational lists as proposed by Duff or the redistribution of the seats, the opinion was also rendered that it is simply not the time for such a proposal to be submitted.⁶⁶³

Coming from the Eurosceptic side of Parliament, Mr Morten Messerschmidt claimed that European lists were ‘too far away from the people’.⁶⁶⁴ Mr Ashley Fox joined in the criticism and took offence at establishing a European authority over an area that used to be a national right. The role for the European electoral authority was to enhance the power and status of a federal government.⁶⁶⁵ The European list was something for the European parties to do, totally artificial, unnecessary and a waste of taxpayers’ money.⁶⁶⁶ Fox did not think that the way the European Parliament is elected should change. He was happy with the current

⁶⁶² *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 30:46.*

⁶⁶³ *Interview with Mr Enrique Guerrero Salom, MEP, Deputy Parliamentary Group Leader of the S&D Group, S&D AFCO Coordinator, 14 December 2010, answers sent in writing; interview with Richard Corbett, MEP, European Parliament, Bruxelles, 10th February 2009; interview with Martin Schulz, MEP, Aachen, 2nd May 2009.*

⁶⁶⁴ Morten Messerschmidt, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform.*

⁶⁶⁵ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 09:56.*

⁶⁶⁶ *Ibid.*

system.⁶⁶⁷ The European Union had to have nothing to do with the process of elections.⁶⁶⁸ He would allow each member state to choose its MEPs exactly how they wanted. Fox considered it wrong that Britain could not have the First Past the Post system, because that was the British tradition. He thought it was wrong to impose a proportional system on Britain out of the European level. But because it was in the Treaty, Britain would have to put up with it. For him, it is the single constituency that was important. If FPTP was not possible, he would be happy to have an Alternative Vote system, providing he had one member, representing one constituency.⁶⁶⁹ It was very confusing in his region, the South-West of England, to represent 5.2 million people, together with five other MEPs with different political views. The constituents did not know who they were, then they found out on the website that there are six MEPs, then they wrote a letter and addressed it to all six. The result was that they could be ignored by all six, but as it happens the three conservative members had divided the region into three areas. The three conservative MEPs tried to reach a constituency system from a regional system. It was the single constituency that was the most important thing in a majoritarian system. He preferred FPTP because it was a British tradition and because it worked well, and because it introduced more accountability. One had the best opportunity of getting rid of somebody who was 'bad'.⁶⁷⁰ Therefore, parliamentarians were more likely to perform well, whereas in the current system in the UK, the first conservative candidate on a list was certain to be elected. The

⁶⁶⁷ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 00:13.*

⁶⁶⁸ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 17:23.*

⁶⁶⁹ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 01:07.*

⁶⁷⁰ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 02:30.*

conservative committee choosing a number one for the list had already chosen an MEP. Person number two was highly likely to be elected. Fox was number three in the list and the marginal position. When they went into the 2009 election, they already knew the result for four of the candidates.⁶⁷¹ It struck him to be profoundly undemocratic. The idea that a proportional representation list system was more democratic because it was open or fair was complete nonsense. It was not fair because a different group of people chose the members of parliament. In some European countries, there was the situation that the country leader chose the entire list, that was the case in Spain, for example, whereby there is one constituency for the whole country, and everybody knew that of 50 MEPs, the Conservatives would get at least twenty, and the Socialists would get at least twenty, and there were ten in the middle that were decided on by the electorate.⁶⁷² The party boss chose the first twenty, and those were absolutely loyal to the party boss and that did not strike him to be particularly democratic. He did not deal with the argument of equality of the vote for PR system, because Fox considered the use of the word 'fair' to be totally subjective. What did fair mean? His preferred reform would be to let all member states choose their MEPs in precisely that manner they preferred. One was talking about twenty-seven independent systems, to reflect that in his view, the European Union was a club of twenty-seven independent sovereign states.⁶⁷³

⁶⁷¹ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 03:06.*

⁶⁷² *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 04:28.*

⁶⁷³ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 05:55.*

Another aspect in the debate is the matter of the composition of the European Parliament. With regards to the distribution of seats, Duff stated that after the admission of 18 new MEPs (due to Lisbon), there were still five Member States not accepting the principle of degressive proportionality.⁶⁷⁴ Concerning the matter of demographics, he argued that whereas France and the UK had a rising population, the size of the population in Germany was declining. This problem of a shift in Member States' electorates had to be catered for.⁶⁷⁵ Pursuing an implementation of the principle of degressive proportionality is a widely shared point of view in Parliament.⁶⁷⁶ What many would like to avoid in the future is to have such a discussion as during past IGCs, meaning that it should be tried to have an objective algorithm in order to distribute seats according to population on the basis of that principle.⁶⁷⁷ Having such an algorithm would avoid a situation in which a member state gets two more seats because it behaved well during an IGC and another one because it has more votes in the Council etc. Parliament would need to exercise this method for being able to grant Members of Parliament to Croatia.⁶⁷⁸ Because such a neutral mechanism would also have required a Treaty change, it was in the end not adopted in the form of a Report by Parliament due to a reluctance of setting an amendment process in motion.

⁶⁷⁴ Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁷⁵ Andrew Duff, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁷⁶ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 0:28; Interview with Mr Helmut Scholz, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 09:46; Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): Meeting of 4 May 2010 on Electoral Reform.*

⁶⁷⁷ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 01:15 and even in the Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 20:39, Fox is broadly in favour.*

⁶⁷⁸ *Ibid.*

Differences of opinion also became evident on proposed reform elements of lower salience. According to Duff, bigger states should be obliged to introduce regional constituencies: The smaller the constituency, the greater the identification of the electorate with the representative. There was support for this proposal,⁶⁷⁹ others, for example fellow S&D group member Ramón Jáuregui Atondo, MEP from the Basque Country, underlined that the matter of regional constituencies is a sensitive one and unacceptable in particular for Spain.⁶⁸⁰ Fox claimed that the idea of making regional constituencies mandatory for member states with a population of over 20 million was simply a federal concept that allowed the EU to dictate member states their electoral law.⁶⁸¹

For a better connection between voters and MEPs, it is held by some that preferential voting should be introduced in all member States.⁶⁸² Others argued that a compulsory introduction of preferential voting was unwise because in many member states voters are not used to this form of voting.⁶⁸³ Parliamentary democracy is further regarded as a democracy solely of political parties by some.⁶⁸⁴

Due to the problem of confidentiality of national results in European elections, and to dramatise elections, polling should be reduced to Saturdays and Sundays.

⁶⁷⁹ Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁸⁰ *Interview with Mr Íñigo Méndez de Vigo, MEP, European Parliament, Bruxelles, 30th of November 2010, at minute 25:51; Ramón Jáuregui Atondo, Committee on Constitutional Affairs (AFCO): Meeting of 4 May 2010 on Electoral Reform.*

⁶⁸¹ *Interview with Mr Ashley Fox, MEP, European Parliament, Bruxelles, First of December 2010, at minute 09:56.*

⁶⁸² Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁸³ Jaime Mayor Oreja, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁸⁴ *Ibid.*

For two reasons, Duff also advocated to move forward European elections from June to May: first, Scandinavian states have their summer holidays in June, second, the EP needed more time to organise for the election of the Commission President in July.⁶⁸⁵ Gender balance remained an issue in several Member States, although progress has been made on average concerning the gender balance of parliament. Because a change of active voting rights makes constitutional changes necessary in some member states, this element met with opposition in AFCO and did not make it beyond the first official Report.⁶⁸⁶ Minimum standards for European parties found support in the Committee as well, for example Roberto Gualtieri argued for legal standards equivalent to those in the Federal Republic of Germany.⁶⁸⁷ As there was no majority within political groups to initiate a Treaty change at the time, which key proposals would have required, Parliament in the end did not pursue an amendment of the Elections Act at all and issued the Resolution on the 2014 European Parliament elections to present candidates for the office of the President of the Commission and a gender balanced body of Commissioners drawn primarily from amongst Parliament's ranks.

Different models of the EU lead to different positions on the need for and the details of European electoral reform. Although actors do not use models as consistent as in academia, views of the European Union range from that of an international organisation to a federal model, including elements of functionalist and governance approaches. Despite the existence of intergovernmentalist views in Parliament, who regard the nation state as central in the legitimation matter, a

⁶⁸⁵ Andrew Duff, Enrique Guerrero Salom, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁸⁶ Jaime Mayor Oreja, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

⁶⁸⁷ Roberto Gualtieri, Committee on Constitutional Affairs (AFCO): *Meeting of 4 May 2010 on Electoral Reform*.

federal bias in the EP within the five major political groups can be assessed. Proponents of the federal model regard the European Parliament as the key in bridging the legitimisation gap. Consequently, followers of the international organisation model reject the possibility of a non-national democracy, and deny the very need for reform. Rather, electoral reform along the lines of the Reports is considered harmful, as intergovernmentalist actors prefer to allow member states to choose their own system. Actors such as Fox advance their model in a stringent way: they regard the EU as an international organisation, rejecting a federal model. Towards their state centred view, they apply a majoritarian democratic model, logically preferring a majoritarian electoral system. Out of actors' definition of accountability, this is paired with the necessity of a single constituency. Actors following a federal model, on the other hand, apply a post-national democratic model, with the mechanism of a European constituency to break national dominance in European elections. The values of fairness and equality translate into a PR system. Even an increase to 10 % of the chamber's component members elected from European lists has been suggested, and there was general support of the Commission for the proposal of European lists. Although the federal model is widely shared in Parliament, there existed no willingness for treaty change. For the same reason, a proposed algorithm for the distribution of seats faltered. As became evident in a joint session of AFCO and MP from national parliaments, required in the ratification process, national MPs see their role in the integration process threatened. Against the background of the debt crisis, followers of the federal model regarded Duff's Reports as a good proposal at the wrong time.

Conclusion

Models among actors range from that of an international organisation to a federal model, although these models are not always presented in academic terms. The federal model, however, features most prominently among AFCO coordinators. Followers of the international organisation model reject the possibility of a non-national democracy and consequently deny the very need for reform. Electoral reform along the lines of the Reports is considered counterproductive, because nation states should be allowed to draft their own systems without any constraints from the European level. A majoritarian democratic model with a majoritarian electoral system is preferred in nation-state centred views. Proponents of the federal model, on the other hand, apply a post-national democratic model, with the key mechanism of a European constituency to break national dominance in European elections.

Rapporteur Duff's Reports have been washed down from more ambitious proposals in the first Reports to a core of suggested amendments. Following the analysis of recent debates on electoral reform, Chapter Six presents a normative proposal in the form of an outline of an ideal type electoral system, as well as a practical implementation into electoral law. The ideal type differs significantly from any proposals in this and previous Chapters, but takes into account Rapporteur Duff's proposals and the various positions articulated in the debates discussed in the present Chapter. As I have the splendid opportunity in this thesis to develop core proposals for an ideal type electoral law without constraints of power politics, I shall now turn to identify the dimensions of an ideal type electoral system and to provide a translation of my ideal type into electoral law.

CHAPTER SIX

WHICH ELECTORAL SYSTEM CAN BEST ACCOMMODATE A LEGITIMATE POLITICAL ORDER IN THE EUROPEAN UNION?

Introduction

The chapter moves on to change gear from analysis of historical and contemporary debates on electoral reform to normative proposal. That is, it offers an outline of an ideal type electoral system for a federal model of the European Union in Section 1. While the system suggested does not follow any of the proposed electoral system discussed in the previous Chapters, it does build on both Duff's own proposals and the various positions articulated in the debates discussed in Chapter Five. Chapter Six shall further develop the normative proposal to address the democratic deficit of the federal model and present a translation of the ideal type into core elements of a draft European Electoral Act in Section 2, a new uniform voting system for elections to the European Parliament.

1. Proposal for an Ideal Type Electoral System for Elections to the European Parliament

As findings of Chapter One have shown, the democratic deficit comes through first and foremost under the federal model. In its present state, the European Union represents a consensus democracy in need of competition for European elections to provide legitimacy. The following chapter revealed that, because of diverging interests, no ideal electoral system covering all circumstances can exist. Chapter Three analysed European Parliament elections as a set of 27 simultaneous national elections. However, findings also suggest that competition between European parties on European matters can attract media coverage and provide electorates with an incentive to vote. In the construction of the ideal type, I build

on proposals by Rapporteur Duff's as well as on positions rendered in the debates discussed in Chapter Five.

An electoral connection between EU citizens and politics in the EP and the EU is essential to address the democratic deficit that exists under the federal model. The ideal type is based on the democratic model of a consensus democracy with a competitive element. The values of fairness and equality, associated with PR systems, are central to the ideal type, paired with what Rapporteur Anastassopoulos called the 'close relationship principle', to enable the missing electoral link and bridge the legitimization gap. An ideal type electoral system is expected to generate widespread public participation. It demands easy access for smaller parties and maximising turnout, thereby ensuring parliamentary diversity and social inclusion by means of a fair translation of vote shares into seat shares. Franklin et al. for example agree that a system which provides incentives for pan-European parties to develop and that encourages parties to adopt similar positions across all constituencies rather than tailoring their messages differently in different Member States is needed.⁶⁸⁸

A European Political party system is necessary for voters to be able to evaluate the performance and policies of parties that are empowered to negotiate on their behalf. Enabling voters to articulate preferences about European-level politics and candidatures for the position of European Commission President requires strong European parties. A transformation of the European party federations from a conglomerate of national parties and conference organisers into authentic

⁶⁸⁸ M. Franklin, C. van der Eijk and M. Marsh, *op.cit.*, p 380.

transnational parties is therefore an objective of my indicative ideal type electoral system. The idea of a multiparty European Parliament presupposes the very existence of a political party system relating to the decision-making arena concerned. Such a European party system is postulated in the EU's constitutional framework, which includes the elements of representative democracy, the European Parliament as the legislature of EU citizens and the central role of European political parties. According to Article 10 (4) TEU, the role of raising awareness among the electorate of European issues falls to the European parties. The TEU allocates European political parties the tasks of the formation of a European political awareness and of the expression of the will of citizens of the Union.

Next to strong parties, enabling contact between constituents and candidates is important for providing information on European affairs and thereby incentive to vote. An ideal type electoral system therefore strikes the balance between linking voters to the European arena *and* enabling a link between voters and their MEPs.

With regards to the value of fairness, the equality of the vote is a fundamental principle of PR electoral systems. As Seifert rightfully points out, the equal voting weight is effectively the most important principle of electoral systems today.⁶⁸⁹ This principle is also relevant when it comes to the division of a territory into constituencies. These need to be of roughly the same size to ensure that every vote carries the same weight. Furthermore, the constitutional value of equality implies an equal treatment with regards to gender, age, ethnicity, sexual orientation etc.

⁶⁸⁹ K.H. Seifert, *Bundeswahlrecht* (München: Franz Vahlen, 3rd edition 1976), p 50.

The element of equality equates to the value of ‘one citizen, one vote’. An ideal type electoral system therefore has to cater for equal representation and proportionality. Proportionality is to ensure the existence of multiple parties which are socially inclusive by means of a fair translation of votes into seats. A fundamental requirement for any European electoral law must be overall proportionality to ensure parliamentary representation through a variety of parliamentary groups.

As results of Chapter Two have shown, there is an inevitable trade-off between different and often conflicting aims and functions of electoral systems. The better performance of an electoral system with regards to one function corresponds to a reduced performance with regards to another function. A suboptimal accomplishment of one aim is therefore a possibility for a better performance with regards to other aims. However, I shall investigate the intersections of three options for a European electoral law, based on the above named principles. To begin with I explore the possibility of a closed list PR system for European Parliament elections.

A ‘pure’ PR system with closed European party lists would result in an electoral contest between political parties rather than candidates. The constituency would be made up of one European, very large district. A ballot structure of closed lists would reduce the choice of voters, but the result of open lists would be weak parties and (very few) high profile candidates. A ‘pure’ PR system with closed lists would lead to strong European parties, but increase the distance between voters and MEPs.

As an alternative, small multimember districts with PR and an open ballot such as semi-open lists, open lists, or STV would result in a greater connection between voters and candidates. Farrell and Scully propose a regionalisation of EP elections with an open list system to bring European representatives closer to their citizens.⁶⁹⁰ Hix agrees and suggests ‘relatively small multi-member districts with some form of open ballot’ to allow citizens to choose from the same political party.⁶⁹¹ He holds that such reform would increase incentives for MEPs and candidates to raise their profile directly with voters, which in turn would raise public awareness and participation in EP elections.⁶⁹² Ritchie, a proponent of greater uniformity of the electoral systems in use, advocates the use of STV because it would strengthen voters’ sense of attachment to their representatives.⁶⁹³ With regards to the matter of transnational lists, he argues that practical problems concerning their implementation would outweigh the benefits.⁶⁹⁴ Relatively small multi-member districts would increase candidates’ profiles to citizens and strengthen the link between voters and representatives. Turnout is also usually higher in electoral systems that use a form of PR. However, small multimember districts would not strengthen pan-European Parties or lead to an increase in European content of electoral campaigns. Small districts lead to high thresholds for parties to gain seats and lower proportionality. The bigger the constituency, the more proportional is the outcome. A negative effect of open ballots in one large constituency would be the sheer size of ballot papers: a long list of

⁶⁹⁰ D. Farrell and R. Scully, *op.cit.*, p 205.

⁶⁹¹ S. Hix, *Citizenship and Electoral Procedure* (Brussels: Committee on Constitutional Affairs, workshop 25/26 March 2008), p 6.

⁶⁹² S. Hix, *ibid.*

⁶⁹³ K. Ritchie, *op.cit.*, p 7.

⁶⁹⁴ K. Ritchie, *ibid.*

candidates from each political party would produce extremely long ballot papers. This hardly feasible solution would foster confusion instead of choice.

A Two Tier Districting or Mixed Member Proportional system could be beneficial with regards to two key elements of an ideal type. TTD/MMP systems, which are for example in use in different variants in Germany, Japan, New Zealand, Scotland, Wales and Greater London, can be a particularly attractive way of combining the advantage of close representation in small constituencies with aggregate proportionality of high-magnitude districts. Franklin, van der Eijk and Marsh mention that, without elaborating this point further, such a system could work quite effectively.⁶⁹⁵ The ballot structure of my TTD/MMP system would offer the electorate two votes: one for a candidate in a single-member constituency and one for a transnational, pan-European party list. As MEPs are representatives of EU citizens, not of Member States, these transnational lists would need to be composed of candidates of a significant number of member states, gender-balanced, taking into account the principles of equality and proportionality. The larger the constituency, the more proportional is the outcome. Therefore, the electorate can vote for a party in a European constituency. With the equality of the vote as an essential requirement, Member State boundaries need to be by-passed. Under a federal model, differences in the size of the population of Member States are to be reflected in the upper house - in the Council, that is - and not in the European Parliament. The Duff Reports, as analysed in Chapter Four, intended to introduce a European tier with transnational lists, but only for a small portion of 25 MEPs. The Rapporteur also intended to achieve a distribution of

⁶⁹⁵ M. Franklin, C. van der Eijk and M. Marsh, *op.cit.*, p 380.

seats according to the principle of degressive proportionality, far from suggesting any proportional allocation. In addition to voting for the European list, voters would have a vote for a candidate in a single-member constituency. The candidate with the highest number of votes wins the constituency. This would allow for a better contact between the electorate and representatives. The element of single-member constituencies, as proposed by Fox, is supposed to foster a link between voters and candidate MEPs. Under my ideal type, half of the number of seats should be filled with constituency candidates, the second half with European list candidates, to ensure a proportional outcome. Candidates for the EU list should be allowed to run for a single-member constituency as well as for the European list. Such a combination of the two elements of European lists and constituencies can result in ‘the best of both worlds’ of an ideal type under a federal model: overall proportionality, equality of the vote, strong European parties, competition on European matters, media coverage, high incentive for electorates to vote on European matters, but an equally high visibility of candidate MEPs in their constituencies at the same time. Due to the fact that an elected constituency candidate cannot be deprived of his mandate, it is possible that under a TTD/MMP system a political party receives more mandates from the constituency vote in Europe than it would be entitled to with respect to proportionality under the list vote. These mandates are called excess or surplus mandates. To ensure overall proportionality, compensation mandates are drawn from party lists of the respective other parties. Therefore, my TTD/MMP system is basically a PR system, but with an additional ‘personalised’ element. No fixed ceiling for the number of MEPs exists due to the possibility of excess and compensation mandates. The Second vote for a European list is the decisive vote for determining

the parties' seat share in Parliament. For more proportional results and more opportunities for smaller parties, the Saint-Laguë method should be used for the upper tier, the European constituency. A low legal threshold would avoid splinter parties in parliament, but allow for coalitions in the EP. A federal constituency makes a European electoral authority with a returning officer essential for setting results, overseeing elections and to conduct and verify elections.

Constituencies need to be of roughly the same size, in accordance with the European census, to ensure equality of the vote, according to values of fairness and openness in a plural European society. This makes essential constituencies for cultural or linguistic 'minorities'. Furthermore, the filling of seats which fall vacant during the five-year term of office needs to be administered. As electoral systems need to be adjusted from time to time to cater for societal developments or malfunctions of the system itself, further amendments of the elections act should be enacted by an absolute majority in the EP and a qualified majority in the Council. Although political parties nominate MEP candidates, there is no imperative mandate: MEPs 'vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.'⁶⁹⁶

With regards to the field of electoral regulations, elections should be held on one single election day to have a better focus of attention and to avoid voters being influenced by the premature publication of election results in other parts of the Union. To foster turnout, the elections should not be held during the holiday season.

⁶⁹⁶ Article 3 (1), Statute for the Members of the European Parliament, Decision of the European Parliament of 28 September 2005 (2005/684/EC, Euratom).

To ensure equality, active and passive electoral rights should comprise the same age across Europe. The participation of citizens residing in a member state of which they are not nationals needs to be allowed under the same conditions as apply to the nationals of the respective Member State in accordance with Directives 94/80 and 93/109. Postal vote should also be encouraged all over the EU to make it as easy as possible for EU citizens to make use of their voting rights and thereby to foster turnout.

In the discussions on electoral reform, a closed list PR system for the entire European Union has not been proposed at all. Small multimember districts with PR and an open ballot have only in so far been suggested in the Reports as to making regional constituencies mandatory for larger member states. Concerns about the EP's democratic legitimacy were shared by several colleagues. Democracy was a *raison d'état* for the European Union, parliamentary representative democracy was the very basis for Europe. A disconnect between European citizens and the EU had to be overcome. Despite the clear federal mindset of Rapporteur Duff, his Reports quite significantly differ from my ideal type due to his constraints from other actors in day-to-day politics. He foresees first steps towards post-national democracy by the introduction of transnational lists. In general, fears of Treaty changes and IGCs, and of a Convention in particular, could be observed in Parliament. The Duff Reports and suggestions of its shadows come closest to a Two Tier Districting, but with a very small second tier of 25 MEPs in comparison to the first tier. In the end, these lists were supposed to be closed lists, either on top or as a share of the component members. Because usually a third or half of the number of seats is elected on the upper tier

to ensure overall proportionality, Duff's proposal does not constitute a Mixed-member proportional system. The Rapporteurs's approach is different as it is only trying to introduce Pan-European lists for the purpose of dramatising elections by making European parties choose candidates for the office of Commission President. With regards to ballot paper structure, the Reports intend for the second vote on a separate ballot paper, unusual for TTD/MMP systems. The system of additional members did not intend for an overall proportional system. In comparison to his predecessor's Report by Rapporteur Anastassopoulos, who suggested electing 10 % of the current mandates by means of transnational lists, the Duff Reports already represented rather modest proposals. The Rapporteur, following the principle degressive proportionality, attempts to achieve both equal representation and taking differences in the size of member states into account at the same time. Whereas I suggest the use of the Saint-Laguë method for the European constituency for more proportional results, the Reports in their later stages call for the use of d'Hondt. In my model, I propose the introduction of a uniform, low legal threshold. The matter of thresholds is not picked up again in the Duff reports. Whereas I support constituencies of about roughly the same size, the Rapporteur, in the early Reports, suggests the introduction of regional constituencies for member states with a population of more than 20 million citizens. Duff conforms to the introduction of a returning officer in the form of a European electoral authority. Further changes to the Electoral Act of my ideal type include one single election day, uniform active and passive voting rights, and simplifying expat voting by introducing a European electoral role, also enabling a Europe-wide introduction of postal vote.

2. A Translation of the Ideal Type into a Draft Electoral Act

My proposal concentrates on the primary function of electoral systems, the translation of votes into seats. The ideal type amending the 1976 Elections Act takes into account proposals by Rapporteur Duff and his colleagues in the course of debate, and at the same time illustrates significant differences from these proposed draft amendments. In this thesis, I have the privilege that I can develop my electoral system without having to take into account bargaining processes of day-to-day politics, though these are clearly acknowledged as constraints facing actors working on electoral reform. The following Articles present the core of an amended European electoral Act and cover central changes to the electoral system. Other parts, dealing with the conduct of elections and verifications of results, have been touched only in so far as they involve the set up of a European electoral authority and matters such as voting age or postal voting, because those are important for making changes in the way elections are administered. Some further matters of electoral reform have been dealt with satisfactorily in Duff's Reports, in particular the issues of incompatibilities, filling of vacancies, credentials of members, campaign expenses, duration of the legislature, privileges and immunities, *modus operandi* for future changes to the Elections Act, etc. As I am basically *d'accord* with proposals in these areas, they have not been reproduced here again to maintain a focus on the essential changes to the electoral system. The current 1976 Elections Act as amended and MMP/TTD systems such as the electoral law for the parliament of the state of Schleswig-Holstein and the *Bundeswahlgesetz* have been partially helpful in constructing the following

Articles.⁶⁹⁷ The overall 1976 Elections Act would need to be renumbered and rewritten as a consequence, amendments further necessitate changes to Articles of TEU and TFEU, which shall be equally reproduced in this Chapter. Moreover, changes to the Regulations governing European parties will become essential with regards to the matter of party and campaign financing.⁶⁹⁸ As this thesis has its focus on electoral systems, the latter Regulations fall beyond its scope. I shall now present the ideal type electoral system for European elections:

⁶⁹⁷ 1976 Elections Act in the amended form as reproduced in the Duff Reports, which is a consolidation produced by the Legal Service of the European Parliament on the basis of the Act concerning the election of the representatives of the Assembly by direct universal suffrage (OJ L 278, 8.10.1976, p. 5), as amended by Decision 93/81/Euratom, ECSC, EEC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 33, 9.2.1993, p. 15), and Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ L 283, 21.10.2002, p. 1). It differs from the consolidated version produced by the Publications Office of the European Union (CONSLEG. 1976X1008-23/09/2002) on two points: it incorporates an indent to Article 6(1) '– member of the Committee of the Regions' resulting from Article 5 of the Treaty of Amsterdam (OJ C 340, 10.11.1997) and is renumbered in accordance with Article 2(1) of Council Decision 2002/772/EC, Euratom; Please refer to Appendix VIII for details of the Act; Schleswig-Holstein, *Wahlgesetz für den Landtag von Schleswig-Holstein (Landeswahlgesetz – LwahlG), in der Fassung vom 7. Oktober 1991, gültig ab 08.04.2011*; Bundesrepublik Deutschland, *Bundeswahlgesetz (BWG), in der Fassung der Bekanntmachung vom 23. Juli 1993, (BGBl. I S. 1288, 1594), das zuletzt durch Artikel 1 des Gesetzes vom 12. Juli 2012 (BGBl. I S. 1501) geändert worden ist.*

⁶⁹⁸ Regulation 2004/2003 EC of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding [2003] OJ L 297/1, 15.11.2003; [2008] OJ C 252/1; European Commission Regulation No 1524/2007 of the European Parliament and the Council of 18 December 2007 amending Regulation No 2004/2003 on the Regulations governing European parties at European level and the rules regarding their funding.

Act

Concerning the Election of the Members of the European Parliament

by Direct Universal Suffrage

Article 1

1. The European Parliament comprises of 750 members subject to the provisions of this Act. Members of the European Parliament are elected by European citizens eligible to vote on the basis of a Mixed Member Proportional System. 375 Members of the European Parliament are elected by relative majority in single member constituencies, the remainder are elected by proportional representation from European lists on the basis of second votes cast in the European Union, taking into account successful constituency candidates.

2. Every voter has two votes, a first vote for the election of a candidate in a constituency, and a second vote for the election of a European list.

3. Elections shall be by direct universal suffrage and shall be free, equal and secret.

Article 2

1. The electoral area is the territory of the European Union.

2. The European Union is divided into constituencies. The apportionment into constituencies follows from an Annex to this Act. The European electoral authority ensures that the number of citizens in a constituency does not deviate from the average number of citizens in the constituencies by more than 15

percent. If the divergence is greater than 25 percent, the European electoral authority has to carry out a new apportionment. Data as provided by Eurostat shall be authoritative for the establishment of the number of citizens.

3. There shall be one additional constituency formed of the whole of the Union for the election of European lists. European lists by European political parties shall be admissible only if composed of candidates resident in at least a third of Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish a European electoral authority to conduct and verify the electoral process. The European electoral authority shall administer the European electoral roll, which is based on the electoral registers of municipal authorities.

Article 3

In every constituency, the candidate who polls the most votes is elected. In case of an equality of votes, the local returning officer decides by lot.

Article 4

1. Every European political party participates in the distribution of seats to European lists which receives at least three per cent of second votes cast or a minimum of five constituency seats. This restriction does not apply to lists of minorities.

2. The number of successful constituency candidates of a party for which no European list has been admitted, or who do not fall under the category of subparagraph 1, sentence 2 of this Article, as well as the number of successful non-party candidates, shall be deducted from the total number of seats as noted under Article 1, 1..

3. For the distribution of seats from European lists, the number of valid second votes for each European party participating in the allocation of seats by proportional representation is added. On basis of the total number of votes, it shall be determined for each party entitled to compensation following the sequence of the maximum number, which is the result of division by 0,5 – 1,5 – 2,5 et cetera, how many of the remaining seats following subparagraph 2 fall upon it (proportional share of seats).

4. The parties obtain as many seats from the respective European lists as they are lacking in comparison to their proportional share of seats after taking into account the elected constituency candidates.

5. In case the number of successful constituency candidates of a party is greater than its proportional share of seats, the party retains these exceeding seats (overhang seats/excess mandates). In such a case further seats shall be distributed according to the disregarded subsequent maximum numbers under subparagraph 3 and allocated in accordance with subparagraph 4 until the last extra seat is covered by the proportional share of seats/a proportional share of seats is established (compensation mandates).

6. Within parties, seats from the European lists shall be distributed according to the order of the lists.

Candidates who have been successful in their constituencies shall be discarded from the lists.

Article 8

Deleted.

Article 9

1. All European citizens shall be eligible to vote who have completed their 18th year of life on elections day.

2. Candidates for European Parliament elections shall be eligible to stand who have completed their 18th year of life on elections day.

Article 10

1. The President of the European Commission determines the elections day. Elections to the European Parliament shall be held on a Sunday.

2. At postal vote, voters shall send their municipal election office a post-paid letter vote for it to arrive in time on elections day at the time of closure of polling places. Voters who wish to hand in their postal vote on elections day shall ensure that their letter arrives at the election board of their constituency in time before the closure of polling places.

The proposed amendments necessitate further changes to the EU's constitutional framework:

Revised Article 14 of the Treaty on European Union⁶⁹⁹

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.
2. The European Parliament shall be composed of representatives of the Union's citizens. There shall be a minimum of 750 seats. Representation of citizens shall be proportional.
3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free, equal and secret ballot.
4. The European Parliament shall elect its President and its officers from among its members.

Revised Article 223 of the Treaty on the Functioning of the European Union⁷⁰⁰

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting by qualified majority in accordance with a special legislative

⁶⁹⁹ Please refer to Appendix VII for the current version of Article 14 TEU.

⁷⁰⁰ Please refer to Appendix VII for the current version of Article 223 TFEU.

procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

2. The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.

Conclusion

My ideal type suggests a Two Tier Districting or Mixed Member Proportional system. The ballot structure of this TTD/MMP system offers the electorate two votes: one for a candidate in a single-member constituency, and one for a transnational, pan-European party list. A closer link between voters and their MEPs within the limits of constituencies' sizes will be generated via the first vote. Candidates for the European lists are allowed to run for a constituency at the same time as well as for the European list, as this could further foster the link between constituents and their candidate MEPs. Half of the number of seats should be filled with constituency candidates, the second half with European list candidates. The second vote is the determining vote with regards to a political party's share of seats in Parliament. Due to the fact that an elected constituency candidate cannot be deprived of his mandate, it is possible that under a TTD/MMP System a

political party receives more mandates from the constituency vote than it would be entitled to with respect to proportionality under the list vote. These mandates are called excess mandates. To ensure overall proportionality, compensation mandates are drawn from the party lists of the respective other parties. The TTD/MMP system is basically a personalised proportional system. The ceiling of 750 seats is not rigid, but flexible. Further elements of the indicative ideal type electoral system include the use of the Saint-Laguë method for the European constituency for more proportional results and better opportunities for smaller parties and a uniform, a low legal threshold of 3% to avoid splinter parties in Parliament, but allow for stable majorities in the EP. Constituencies need to be of roughly the same size, in accordance with the European census, to ensure equality of the vote. This makes essential constituencies for 'minorities'. A European constituency makes a European electoral authority with a returning officer and a European electoral roll essential for setting results, overseeing elections and to conduct and verify elections. As electoral systems need to be adjusted from time to time to cater for societal developments or malfunctions of the system itself, further amendments of the elections act shall be enacted by an absolute majority in the EP and a qualified majority in the Council. With regards to the field of electoral regulations, elections shall be held on Sundays and not be held during the holiday season. To ensure equality, active and passive electoral rights comprise the same age of 18 across Europe. Postal vote is also encouraged all over the EU to make it as easy as possible for EU citizens to make use of their voting rights and thereby to foster turnout.

CONCLUSION

This thesis has addressed the democratic deficit point by constructing an ideal type electoral system in relation to a federal order. The main objective of this electoral system is to engage European parties in competition on European matters. Thereby, this research has offered legal scholars a new interdisciplinary account of the elements of an effective electoral law for the EU level to provide democratic legitimacy to the European Union.

By an analysis through the lens of the three models of the EU as an international organisation, as a supranational technocratic regime, and as a federal model, this thesis has commenced with exploring the European Parliament's role in providing democratic legitimacy. Whereas the European Parliament has little or no role in the legitimation of the European Union according to those who regard it as an international organisation or as a supranational technocratic regime, legitimation under a federal model requires a directly elected European Parliament as its key institution. Only the federal model positively endorses the role of EU-level democracy. To the extent that the other models address the issue of democracy, they focus on the state level, treating EU level democracy as either irrelevant or even counterproductive. Under the federal model, Parliament fails to address this democratic deficit due to the way elections to the EP are currently conducted, although the European Parliament is being regarded as the central legitimating mechanism for the European Union by proponents of that model. Basically, a European democracy is possible, the no-demos thesis does not bring forward

convincing arguments to proponents of the federal model either. The constitutional order supports democracy as envisaged by proponents of the federal model. The Union represents a consensus democracy in its current state, lacking a competitive element in the form of European parties' electoral competition to provide legitimacy. An effective link between Parliament and EU citizens is missing to address the democratic deficit. The implementation of a competitive element in the consensus democracy of the EU is therefore needed, bringing the EU further away from the consensual model and closer to the majoritarian model. This thesis has addressed the democratic deficit of the EU by connecting the democratic model of a consensus democracy with a competitive element to the matter of electoral system reform. This electoral reform is supposed to establish a European political party-based democracy, with the European Parliament as the main arena of democracy in the EU in accordance with federal model. Chapter One has made the contribution of analysing both Parliament's role in legitimising the EU through the lens of the three models and the kind of democracy needed to remedy the democratic deficit.

Chapter Two has provided an analysis of the literature on electoral systems and an overview of the key concepts and the terminology of electoral systems in use. The choice of electoral system has major consequences for the mode of representation and on the legitimacy it generates. The choice of an ideal type electoral system depends largely on the democratic vision or model which is applied. On the one side, majoritarian democratic models equal principal-agent forms of representation and majoritarian electoral systems, on the other side, consensus models equal microcosm conceptions of representation with proportional

representation. In the construction of an ideal type electoral, combining proportionality with a possible close contact between voters and candidates in constituencies are conflicting aims. Chapter Two has provided the contribution of integrating positive political science and the normative legal approach. This chapter has at the same time focused on the federal model and on the interdisciplinary element of this thesis. It has offered legal analysis a detailed account of the implications of federalism for EU level democracy.

In Chapter Three, I have developed an analysis of the history of electoral law for the European Parliament and debates around its reform. The two diverging aims of direct elections on the one hand and a uniform system on the other have marked the early phase from the founding years of the Communities to the first direct elections in 1979. Whereas followers of the federal model regarded both aims as essential in the unification of Europe and in the legitimation of power, the goal of direct elections was pursued first. Finding consensus among all member states on a uniform system was considered a difficult task. The growing diversity of electoral systems hindered electoral reform in the following decades. In 1998, adopting common principles allowed for limited progress on the way the EP is elected. However, European Parliament elections continue on the different national systems. There are significant variations in the way in which these elections are conducted across the member states and research on European electoral behaviour has broadly confirmed the Second-Order National Elections model. At the same time, evidence suggests that competition between European political parties is central for attracting media attention and for voters to be able to evaluate the performance and policies of parties. Providing the electorate with

information on European matters requires both European party competition as well as campaigning of individual candidates. An ideal type electoral system needs to achieve both, linking voters to the European arena *and* enabling a link between voters and MEPs to address the democratic deficit. The historical analysis method in Chapter Three has developed an account of the history of electoral law for the European Parliament, its implications, and on debates around a reform of electoral systems. The collection and analysis of this material forms another original contribution made by this thesis to the existing literature.

Recent reform attempts of Rapporteur Andrew Duff have been investigated in Chapter Four. The reform proposals mirror the federal model Duff applies to the EU. In his Reports, the Rapporteur introduces elements of transnational democracy to the consensual democratic model of the European Union, particularly by means of the key proposal of all Reports, the introduction of a new Article 2b, amending the 1976 Elections Act by introducing transnational lists, with 25 MEPs elected from a European constituency, and the set up of a European electoral authority. The analysis of Duff's proposals contributes to the presentation of a detailed and exclusive contemporary account of recent reform attempts. Furthermore, elite interviewing provided information on the reform proposals and filled the gaps left by published documents.

Chapter Five has considered the debates on the Duff Reports. Most positions on Duff's proposals show their proponent's underlying EU model and corresponding democratic visions, as well as differences on concrete amendments of the 1976 Elections Act. The very need for electoral reform has also been highly contested.

As Chapter Five has shown, the range of classifications of the European Union among Parliamentarians is diverse. Whereas eurosceptics hold up the nation state and promote the international organisation model, integrationists describe the model of the EU in a manifold way, from a *Staatenverbund* with supranational and technical elements to a federal model. At times, actors in Parliament use such definitions more randomly as they are developed in academia and case law. In Parliament, a federal impetus is predominant in the chamber, but intergovernmental views exist also. Left and right orientations are not significant in that regards, rather the orientation between integrationists and eurosceptics within the five major political groups. Different models of the EU lead to different evaluations on the need for and the details of European electoral reform. On the one side, proponents of the federal model regard the European Parliament as the key in bridging the legitimisation gap, on the other, followers of the international organisation model reject the possibility of a non-national democracy, and deny the very need for reform. Rather, electoral reform along the lines of the Duff Reports is considered harmful. Intergovernmental orientated actors prefer to allow member states to choose their own system. For example, Fox advances his model in a stringent way and regards the EU as an international organisation, rejecting a federal model. He applies a majoritarian democratic model, logically preferring a majoritarian electoral system. This is paired with the necessity of a single constituency, underlining the value of accountability. Proponents of the federal model apply a post-national democratic model, with the mechanism of a European constituency to break national dominance in European elections. The values of fairness and equality translate into a PR system. With regards to the European constituency, an increase to 10 % of the chamber's component members has been

suggested, exceeding Duff's proposals. There was also general support of the Commission for the proposal of European lists. Due to a reluctance to engage in Treaty change, the proposals of transnational lists and a proposed algorithm for the distribution of seats faltered. National MPs, required in the ratification process, see their role in the integration process threatened. This became evident in a joint session of AFCO and MPs from national parliaments. Furthermore, against the background of the debt crisis, followers of the federal model regarded Duff's Reports as a good proposal at the wrong time.

Chapter Six has provided a normative proposal in the form of an ideal electoral system for the federal model of the European Union and has presented a translation of the ideal type into core elements of a draft European Electoral Act, a new uniform voting system for elections to the European Parliament.

The analysis presented here has considered the role of democracy in the legitimation of the European Union (addressing, in particular, the question of European level democracy), the part played by electoral rules and electoral systems in democratic polities, and the history of the development of the EU electoral system, before turning to a proposal for its reform. The analyses presented in this thesis represent, I submit, fundamental elements of an account of the historic limits to the possible contribution of the European Parliament to the legitimacy of the European Union together with a proposal for enhancing the potential contribution that the Parliament might make to a democratic and federal European Union.

Equally, however, the analyses presented here could never present a complete or exhaustive account of the democratic legitimation of a federal Europe. Other issues and elements lie behind or beyond the present focus on the role of the electoral system in generation of democratic legitimacy potentially generated for the European Union by the Parliament. For example, European parties would play a key role in the generation of EU legitimacy. Why? In a democratic federal Europe, one might expect European party politics and competition to become a very significant political dynamic, a vibrant party system with lively party competition. That would have other virtues, for example potentially recruiting people and elites with an affinity with and support for European parties, over and above any support they might have for their national parties, and mobilising people into European debates.

By contrast, Duff's proposals are not well suited to achieving a significant enhancement of pan-European party competition. Rapporteur Duff's proposals are about enhancing democracy, but essentially without accomplishing the goal of European political party dynamics, whereas my proposal of a MMP/TTD would allocate European parties the central position in candidate selection and campaigning. For example, Duff has envisaged transnational lists to be composed of political 'celebrities', attracting voters' attention.⁷⁰¹ The Duff Reports would have added a thin, additional layer of 25 Pan-European MEPs to the set of second-order national elections, but not have changed the dynamics of European party politics. Reform proposals coming out of Parliament are by nature more limited in

⁷⁰¹ Andrew Duff, *Committee on Constitutional Affairs (AFCO): Meeting of 4 May 2010 on electoral reform*.

character and have got a different perspective, the perspective of day-to-day politics, with achievable policy goals within constraints of different interest.

Not all proposals take a parliamentary approach. A leading alternative approach is Hix's proposal for a presidential form of European democracy. In as much as the proposals for electoral system reform made in this thesis would help to generate pan-European Party competition, then, they also differ from other influential suggestions for the enhancement of European-level democracy, such as Hix's proposals for a direct election of Commission President. While it is not impossible to imagine that such elections might generate party competition, it is more likely, as Hix himself expects, that they would generate a contest of national parties on non-European matters.⁷⁰² Or indeed, Hix's proposal could end up in a kind of prominent European individuals' model, relatively detached from parties, rather than in a European contest. In that sense, Hix's proposal shows a similarity to the emphasis on political celebrities chosen to attract voters' attention that is evident in Duff's Reports.⁷⁰³

In my view, proposals from Andrew Duff and Simon Hix pay insufficient attention to the role of the European party system. I submit that the generation of a vibrant European party system is a *conditio sine qua non* of the ideal type for a democratic federal Europe. The creation of European-level competition between pan-European Parties - essentially the creation of a European Party System -

⁷⁰² S. Hix, "Why the EU Should Have a Single President, and How She Should be Elected", London School of Economics, Paper for the Working Group on Democracy in the EU for the UK Cabinet Office, Oct. 2002, p 7.

⁷⁰³ Andrew Duff, *Committee on Constitutional Affairs (AFCO): Meeting of 4 May 2010 on electoral reform*.

amounts to something more than European competition between ideological positions, or even between individuals more-or-less associated with particular ideologies. Overall, the ideal type proposal made here is quite distinctive from a legal analysis perspective, incorporating comparative politics of parties and party systems and outlining how that relates to the legal framework of elections.

The contribution of this thesis is that it offers distinctive positive analysis and historical analysis, followed by a normative proposal in the form of an ideal electoral model. Of course, while focusing on positive political science theory of electoral systems, historical analysis of the electoral system of the European Parliament and its reform, and proposals for reform, it has not been possible to engage in a detailed analysis of the potential for the development of the European party system within the ambit of this thesis. Looking forward to future research possibilities, developing such an account from an interdisciplinary legal-political perspective is one way in which the analysis presented here might be developed. Another way in which this research could be widened and extended is by engaging with other analyses and normative proposals for democratising Europe. Future work could develop a more detailed comparison of my parliamentary approach of an indirect election of the Commission President through Parliament and Hix's presidential approaches for the democratisation of Europe via direct elections for European presidency.

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APPENDICES

APPENDIX I

Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), pp 6, 7, and Draft Report I, 15.10.2008, 2007/2207:

- ‘(a) With a view to increasing the proximity between the citizen and Members of the European Parliament, territorial constituencies shall be introduced in all those Member States with a population of more than 20 million;
- (b) Member States may establish special constituencies to meet the needs of minority-language communities;
- (c) In order to engage the citizen by enlarging the scope of choice available, Member States will be required to introduce systems of preferential voting whereby the voter may choose from among the candidates on their preferred list ('semi-open lists') rather than just between party lists ('closed lists');
- (d) The number of Members elected from national lists shall be 750, ranging from a minimum of 5 to a maximum of 95 seats per Member State;
- (e) In order to lighten the procedure for the distribution of parliamentary seats between Member States, and to de-politicise the matter, a redistribution of seats will take place, if justified objectively by Eurostat, before every election. The decision will be taken on the strictly demographic basis of resident population and according to the principle of degressive proportionality as proposed by Parliament and accepted in principle by the 2007 IGC⁷⁰⁴. The redistribution shall be announced at least twelve months before the end of the mandate;

⁷⁰⁴ Declaration No 5 annexed to the Final Act of the IGC. The formula is: '[T]he ratio between the population and the number of seats of each Member State must vary in relation to their respective

- (f) In order to enlarge voter choice, strengthen the European dimension of the electoral campaigns and develop the role of European political parties, an additional single constituency will be created of the whole territory of the European Union. The number of Members elected from this transnational list shall be the same as the number of States. The transnational lists shall be composed of candidates drawn from at least a quarter of the States, and will be gender balanced. Each elector shall be able to cast one vote for the EU-wide list in addition to their vote for the national or regional list. Voting will be preferential according to the 'semi-open' list system; and seats will be allocated according to the Sainte-Laguë method⁷⁰⁵;
- (g) Candidates may stand at the same election both for the EU-wide and the national or regional constituencies; candidates residing officially in more than one Member State, and candidates with dual nationality who are registered on the relevant electoral rolls, shall be eligible to stand on more than one national or regional list at the same election;
- (h) An electoral authority shall be established at EU level in order to regulate the conduct of the election taking place from the EU-wide list and to verify the credentials of MEPs elected from that list. The electoral authority shall be composed of one representative of each Member State, and shall be chaired by the Commission;
- (i) With a view to dramatising the EU-wide nature of the election, polling days will be limited to Saturdays and Sundays;
- (j) Both with a view to encouraging turnout in those Member States where school and university holidays begin in June, and to allow the newly elected Parliament more time to prepare itself for the election of the President of the Commission, the timing of the election will be brought forward from June to May⁷⁰⁶;
- (k) The minimum age to be eligible to vote in the European parliamentary elections shall be 16. The minimum age to be eligible to stand as a candidate shall be 18;

populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more seats than a more populous Member State'.

⁷⁰⁵ The Sainte-Laguë method uses divisors of 1, 3, 5, 7 etc, and will be used in the 2009 European elections in Germany, Latvia and Sweden. It produces a slightly more proportional result than the D'Hondt method.

⁷⁰⁶ As proposed in European Parliament resolution of 1 December 2005 on guidelines for the approval of the Commission, OJ C 285, 22.11.2006, p. 137 (Duff Report).

- (1) Parliament shall verify the credentials of its Members on the basis of the results declared officially by the Member States (including the filling of vacancies) and shall have the powers to rule on any dispute; Parliament shall also be enabled to take action against the withdrawal of a mandate by a Member State where and in so far as the relevant national provisions conflict with the primary law of the European Union.⁷⁰⁷

Amendment 1

1976 Elections Act

1976 Elections Act

‘1. ***In each Member State, members*** of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.

Article 1 – paragraph 1

Amendment

1. ***Members*** of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.⁷⁰⁸

Amendment 2

1976 Elections Act

Article 1 – paragraph 2

1976 Elections Act

‘2. ***Member States may authorise voting based on a preferential list system in accordance with the procedure they adopt.***

Amendment

2. ***The list systems adopted shall be semi-open, whereby voters are able to choose from among the candidates on their preferred list.***⁷⁰⁹

⁷⁰⁷ Andrew Duff, Draft Report I, first draft version of 17.09.2008, 2007/2207(INI), pp 6, 7.

⁷⁰⁸ Andrew Duff, Draft Report I, *op.cit.*, p 10.

⁷⁰⁹ Andrew Duff, Draft Report I, *op.cit.*, p 10.

Amendment 3

1976 Elections Act Article 2

1976 Elections Act

Article 2

‘In accordance with its specific national situation, each Member State may establish constituencies for elections to the European Parliament or subdivide its electoral area in a different manner, without generally affecting the proportional nature of the voting system.

Amendment

Article 2

1. Each Member State may establish constituencies for elections to the European Parliament on a territorial or linguistic basis.

2. Member States with a population of at least twenty million shall subdivide their electoral area into a number of regional constituencies.

3. The establishment of constituencies must not affect the overall proportional nature of the voting system.’⁷¹⁰

Amendment 4

1976 Elections Act Article 2 a (new)

1976 Elections Act

Amendment

Article 2a

1. The total number of Members elected under the provisions of Article 2 shall be 750. Representation shall be degressively proportional, with a minimum of five Members per State. No State shall be allocated more than ninety-

⁷¹⁰ Andrew Duff, Draft Report I, *op.cit.*, p 11.

five seats.

2. For the purposes of distributing seats between Member States in accordance with the principle of degressive proportionality, the ratio between the population and the number of seats of each State must vary in relation to their respective populations in such a way that each Member from a more populous State represents more citizens than each Member from a less populous State and also, conversely, that no less populous State has more seats than a more populous State.

3. The distribution of these seats among Member States shall be reviewed during the mandate of each Parliament. The Council, on a proposal from the Commission, and with the assent of Parliament, shall adopt the decision establishing the composition of the new Parliament. The decision shall be taken not later than twelve months before the end of the mandate.’⁷¹¹

Amendment 6

1976 Elections Act Article 3

‘1976 Elections Act

Article 3

Member States may set a minimum threshold for the allocation of seats. At national level this threshold may

Amendment

Article 3

I. Member States may set a minimum threshold for the allocation of seats ***distributed in***

⁷¹¹ Andrew Duff, Draft Report I, *op.cit.*, p 11.

not exceed 5 per cent of votes cast.

national, regional or linguistic constituencies. At national level this threshold may not exceed 5 per cent of votes cast.

2. There shall be no minimum threshold for the allocation of seats from the EU-wide constituency.⁷¹²

Amendment 7

1976 Elections Act Article 4

1976 Elections Act

‘Article 4

Each Member State may set a ceiling for candidates' campaign expenses.

Amendment

Article 4

*Member States and the electoral authority shall set ceilings for the campaign expenses of candidates and parties.*⁷¹³

Amendment 9

1976 Elections Act Article 6

‘1976 Elections Act

Article 6

1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.

2. Members of the European Parliament shall enjoy the privileges and immunities

Amendment

Article 6

Members of the European Parliament **shall have the rights and obligations laid down in the Members' Statute and** the Protocol on the privileges and immunities of the European Communities.⁷¹⁴

⁷¹² Andrew Duff, Draft Report I, *op.cit.*, p 13.

⁷¹³ Andrew Duff, Draft Report I, *op.cit.*, pp 13, 14.

⁷¹⁴ Andrew Duff, Draft Report I, *op.cit.*, pp 14, 15.

applicable to them by virtue of the Protocol *of 8 April 1965* on the privileges and immunities of the European Communities.

Amendment 10

1976 Elections Act

Article 7 – paragraph 1 – indent 1 a (new)

1976 Elections Act

Amendment

*– member of a national or regional parliament,*⁷¹⁵

Amendment 14

1976 Elections Act

Article 9 b (new)

1976 Elections Act

Amendment

Article 9b

*Candidates may stand on the EU-wide list and on a list in one or more Member States at the same election.*⁷¹⁶

⁷¹⁵ Andrew Duff, Draft Report I, *op.cit.*, p 15.

⁷¹⁶ Andrew Duff, Draft Report I, *op.cit.*, p 17.

Amendment 15

1976 Elections Act Article 10 – paragraph 1

‘1976 Elections Act

1. Elections to the European Parliament shall be ***held on the date and at the times fixed by each Member State; for all Member States this date shall fall within the same period starting on a Thursday morning and ending on the following Sunday.***

Amendment

1. ***Polling days for the*** elections to the European Parliament shall be ***a Saturday and Sunday in May.***⁷¹⁷

Amendment 16

1976 Elections Act Article 11 – Paragraph 2 – subparagraph 2

1976 Elections Act

Should it prove impossible to hold the elections in the ***Community*** during that period, the Council acting unanimously shall, ***after consulting the European*** Parliament, determine, at least one ***month***⁷¹⁸ before the end of the five-year term referred to in Article 5, another electoral period which shall not be more than two months before or one month after the period fixed pursuant to the preceding subparagraph.

Amendment

Should it prove impossible to hold the elections in the ***Union*** during that period, the Council acting unanimously shall, ***with the assent of*** Parliament, determine, at least one ***year*** before the end of the five-year term referred to in Article 5, another electoral period which shall not be more than two months before or one month after the period fixed pursuant to the preceding subparagraph.⁷¹⁹

⁷¹⁷ *Ibid.*

⁷¹⁸ In the versions of Decision 2002/772/CE, Euratom as published in the Official Journal, other than the English and Spanish versions, this period is stated to be one year.

⁷¹⁹ Andrew Duff, Draft Report I, *op.cit.*, pp 17, 18.

Amendment 17

‘1976 Elections Act Article 12

1976 Elections Act

Article 12

The European Parliament shall verify the credentials of *members of the European Parliament. For this purpose it shall take note* of the results declared officially by the *Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers.*

Amendment

Article 12

The European Parliament shall verify the credentials of *the Members of Parliament on the basis* of the results declared officially by the *EU electoral authority and the Member States.*⁷²⁰

Amendment 19

1976 Elections Act Article 13 a (new)

1976 Elections Act

Amendment

Article 13a

1. In the case of the Members elected in the Member States, and subject to the other provisions of this Act, each State shall lay down appropriate procedures for filling any seat which falls vacant during the five-year term of office referred to in Article 5 for the remainder of that period.

2. Where the law of a Member State makes explicit provision for the withdrawal of the mandate of a Member of the European Parliament elected in that Member State, that mandate shall end

⁷²⁰ Andrew Duff, Draft Report I, *op.cit.*, p 18.

pursuant to those legal provisions. The competent national authorities shall inform the European Parliament thereof.

*3. Where a seat of a Member elected in the Member States falls vacant as a result of resignation or death, the President of the European Parliament shall immediately inform the competent authorities of the Member State concerned thereof.*⁷²¹

Amendment 20

‘1976 Elections Act Article 13 b (new)

1976 Elections Act

Amendment

Article 13b

1. In the case of the Members elected for the European Union constituency, and subject to the other provisions of this Act, the electoral authority shall take appropriate steps to fill any seat which falls vacant during the five-year term of office referred to in Article 5 for the remainder of that period.

2. Where the law of the EU makes explicit provision for the withdrawal of the mandate of a Member of the European Parliament elected on the EU-wide list, that mandate shall end pursuant to those legal provisions. The electoral authority shall inform the European Parliament thereof.

3. Where a seat on the EU-wide list falls vacant as a result of resignation or death, the President

⁷²¹ Andrew Duff, Draft Report I, *op.cit.*, pp 19, 20.
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*of the European Parliament shall immediately inform the electoral authority thereof.*⁷²²

Amendment 21

**‘1976 Elections Act
Article 13 c (new)**

1976 Elections Act

Amendment

Article 13c

*The European Parliament shall rule on any disputes which may arise out of the provisions of this Act and which involve the law of the Union.*⁷²³

Amendment 22

**1976 Elections Act
Article 14**

1976 Elections Act

Amendment

Article 14

Article 14

Should it appear necessary to adopt measures to implement this Act, the Council, acting unanimously on a proposal from the European Parliament after consulting the Commission, shall adopt such measures after endeavouring to reach agreement with the European Parliament in a conciliation committee consisting of the Council and representatives of the European Parliament.

Measures to implement this Act *shall be adopted by the Council, acting by qualified majority*, on a proposal from the European Parliament, after consulting the Commission, *and after Parliament has given its assent.*⁷²⁴

⁷²² Andrew Duff, Draft Report I, *op.cit.*, p 20.

⁷²³ Andrew Duff, Draft Report I, *op.cit.*, p 21.

⁷²⁴ *Ibid.*

APPENDIX II

Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report II, 12.04.2010, 2010/xxxx(INI):

Amendment 1,

**‘1976 Elections Act
Article 1 – paragraph 1**

1976 Elections Act

1. *In each Member State, members* of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.

Amendment

1. *Members* of the European Parliament shall be elected *as representatives of the citizens of the Union* on the basis of proportional representation, using the list system or the single transferable vote.⁷²⁵

Amendment 5,

**‘1976 Elections Act
Article 2 b (new)**

1976 Elections Act

[...]

Amendment

Article 2b

4. *EU-wide lists submitted by the European political parties shall be deemed eligible only:*

(a) if composed of candidates resident in at least one third of the States, and

(b) if balanced by gender.⁷²⁶

⁷²⁵ Andrew Duff, Draft Report II, *op.cit.*, p 10.

⁷²⁶ Andrew Duff, Draft Report II, *op.cit.*, p 13.

APPENDIX III

Andrew Duff, Draft Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, Draft Report III, 05.11.2010, 2009/2134 (INI)

Amendment 2

**1976 Elections Act
Article 2 a (new)**

1976 Elections Act

Amendment

Article 2a

1. For the purposes of distributing seats between Member States in accordance with the principle of degressive proportionality pursuant to Article 14(2a) of the Treaty on European Union, the ratio between the population and the number of seats of each State must vary in relation to their respective populations in such a way that each Member from a more populous State represents more citizens than each Member from a less populous State and also, conversely, that no less populous State has more seats than a more populous State.

2. The seats will be distributed in accordance with the mathematical formula laid down in the Annex hereto, on the basis of the total resident population of the States as established by Eurostat.

Amendment 5

1976 Elections Act, Duff Report III Article 4

1976 Elections Act

Each Member State may set a ceiling for *candidates' campaign expenses*.

Amendment

Each Member State may set a ceiling for ***the campaign expenses of candidates and political parties at the national and/or regional level. The electoral authority shall set a ceiling for the campaign expenses of candidates and political parties at the European Union level.***⁷²⁷

Amendment 11,

'1976 Elections Act Article 9

1976 Elections Act

No one may vote more than once in any election of members of the European Parliament.

Amendment

Without prejudice to Article 2b, no one may vote more than once in any election of members of the European Parliament.⁷²⁸

⁷²⁷ Andrew Duff, Draft Report III, *op.cit.*, p 22.

⁷²⁸ Andrew Duff, Draft Report III, *op.cit.*, p 24.

Amendment 17,

**‘1976 Elections Act
Article 13 a (new)**

1976 Elections Act

Amendment

Article 13a

2. Where the law of a Member State provides for a temporary replacement of a member of its national parliament on maternity leave, that State may decide that such provisions are to apply mutatis mutandis to the Members of the European Parliament elected in that State.’

APPENDIX IV

Andrew Duff, Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, REPORT IV/I (First official Report), 28.04.2011, A7-0176/2011.

Amendment 2,

**1976 Elections Act
Article 2 a (new)**

1976 Elections Act

Amendment

2. Where a State accedes to the Union during a parliamentary term, it shall be allocated seats which will be added to the number of seats provided for in Article 14(2a) and (2b) of the Treaty on European Union on a transitional basis for the remainder of that parliamentary term.⁷²⁹

Amendment 8,

**1976 Elections Act
Article 7 – paragraph 1 – indent 1 a (new)**

1976 Elections Act

Amendment

– member of a national or regional parliament with legislative powers,⁷³⁰

⁷²⁹ Andrew Duff, Report IV/I, *op.cit.*, at p 21.

⁷³⁰ Andrew Duff, Report IV/I, *op.cit.*, at p 23.

Amendment 11,

**1976 Elections Act
Article 9**

1976 Elections Act

No one may vote more than once in any election of members of the European Parliament.

Amendment

Without prejudice to Article 2b, no one may vote more than once in any election of members of the European Parliament. In order to ensure that this principle is respected, the European Parliament and the Council, acting by means of a regulation in accordance with the ordinary legislative procedure, shall establish an electoral roll at European Union level.⁷³¹

⁷³¹ Andrew Duff, Report IV/I, *op.cit.*, at pp 24, 25.
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APPENDIX V

Article 14 of the Treaty on European Union:

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed 750 in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than 96 seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

4. The European Parliament shall elect its President and its officers from among its members.

Article 223 of the Treaty on the Functioning of the European Union:

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

2. The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.

APPENDIX VI

Consolidated version of the Act concerning the election of the representatives of the Assembly by direct universal suffrage annexed to the Council decision of 20 September 1976, and of the subsequent amendments thereto

ACT⁷³²

concerning the election of the members of the European Parliament by direct universal suffrage

Article 1

1. In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.
2. Member States may authorise voting based on a preferential list system in accordance with the procedure they adopt.
3. Elections shall be by direct universal suffrage and shall be free and secret.

Article 2

In accordance with its specific national situation, each Member State may establish constituencies for elections to the European Parliament or subdivide its electoral area in a different manner, without generally affecting the proportional nature of the voting system.

⁷³² N.B.: This document is a consolidation produced by the Legal Service of the European Parliament on the basis of the Act concerning the election of the representatives of the Assembly by direct universal suffrage (OJ L 278, 8.10.1976, p. 5), as amended by Decision 93/81/Euratom, ECSC, EEC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 33, 9.2.1993, p. 15), and Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ L 283, 21.10.2002, p. 1). It differs from the consolidated version produced by the Publications Office of the European Union (CONSLEG. 1976X1008-23/09/2002) on two points: it incorporates an indent to Article 6(1) '– member of the Committee of the Regions' resulting from Article 5 of the Treaty of Amsterdam (OJ C 340, 10.11.1997) and is renumbered in accordance with Article 2(1) of Council Decision 2002/772/EC, Euratom.

Article 3

Member States may set a minimum threshold for the allocation of seats. At national level this threshold may not exceed 5 per cent of votes cast.

Article 4

Each Member State may set a ceiling for candidates' campaign expenses.

Article 5

1. The five-year term for which members of the European Parliament are elected shall begin at the opening of the first session following each election.

It may be extended or curtailed pursuant to the second subparagraph of Article 10 (2).

2. The term of office of each member shall begin and end at the same time as the period referred to in paragraph 1.

Article 6

1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.

2. Members of the European Parliament shall enjoy the privileges and immunities applicable to them by virtue of the Protocol of 8 April 1965 on the privileges and immunities of the European Communities.

Article 7

1. The office of member of the European Parliament shall be incompatible with that of:

- member of the government of a Member State,
- member of the Commission of the European Communities,
- Judge, Advocate-General or Registrar of the Court of Justice of the European Communities or of the Court of First Instance,
- member of the Board of Directors of the European Central Bank,
- member of the Court of Auditors of the European Communities,
- Ombudsman of the European Communities,
- member of the Economic and Social Committee of the European Community and of the European Atomic Energy Community,
- member of the Committee of the Regions,
- member of committees or other bodies set up pursuant to the Treaties establishing the European Community and the European Atomic Energy Community for the purposes of managing the Communities' funds or carrying out a permanent direct administrative task,
- member of the Board of Directors, Management Committee or staff of the European Investment Bank,
- active official or servant of the institutions of the European Communities or of the specialised bodies attached to them or of the European Central Bank.

2. From the European Parliament elections in 2004, the office of member of the European Parliament shall be incompatible with that of member of a national parliament.

By way of derogation from that rule and without prejudice to paragraph 3:

– members of the Irish National Parliament who are elected to the European Parliament at a subsequent poll may have a dual mandate until the next election to the Irish National Parliament, at which juncture the first subparagraph of this paragraph shall apply;

– members of the United Kingdom Parliament who are also members of the European Parliament during the five-year term preceding election to the European Parliament in 2004 may have a dual mandate until the 2009 European Parliament elections, when the first subparagraph of this paragraph shall apply.

3. In addition, each Member State may, in the circumstances provided for in Article 8, extend rules at national level relating to incompatibility.

4. Members of the European Parliament to whom paragraphs 1, 2 and 3 become applicable in the course of the five-year period referred to in Article 5 shall be replaced in accordance with Article 13.

Article 8

Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.

These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.

Article 9

No one may vote more than once in any election of members of the European Parliament.

Article 10

1. Elections to the European Parliament shall be held on the date and at the times fixed by each Member State; for all Member States this date shall fall within the same period starting on a Thursday morning and ending on the following Sunday.
2. Member States may not officially make public the results of their count until after the close of polling in the Member State whose electors are the last to vote within the period referred to in paragraph 1.

Article 11

1. The Council, acting unanimously after consulting the European Parliament, shall determine the electoral period for the first elections.
2. Subsequent elections shall take place in the corresponding period in the last year of the five-year period referred to in Article 5.

Should it prove impossible to hold the elections in the Community during that period, the Council acting unanimously shall, after consulting the European Parliament, determine, at least one month⁷³³ before the end of the five-year term referred to in Article 5, another electoral period which shall not be more than two months before or one month after the period fixed pursuant to the preceding subparagraph.

3. Without prejudice to Article 196 of the Treaty establishing the European Community and Article 109 of the Treaty establishing the European Atomic Energy Community, the European Parliament shall meet, without requiring to be convened, on the first Tuesday after expiry of an interval of one month from the end of the electoral period.
4. The powers of the European Parliament shall cease upon the opening of the first sitting of the new European Parliament.

⁷³³ In the versions of Decision 2002/772/EC, Euratom as published in the Official Journal, other than the English and Spanish versions, this period is stated to be one year.

Article 12

The European Parliament shall verify the credentials of members of the European Parliament. For this purpose it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers.

Article 13

1. A seat shall fall vacant when the mandate of a member of the European Parliament ends as a result of resignation, death or withdrawal of the mandate.

2. Subject to the other provisions of this Act, each Member State shall lay down appropriate procedures for filling any seat which falls vacant during the five-year term of office referred to in Article 5 for the remainder of that period.

3. Where the law of a Member State makes explicit provision for the withdrawal of the mandate of a member of the European Parliament, that mandate shall end pursuant to those legal provisions. The competent national authorities shall inform the European Parliament thereof.

4. Where a seat falls vacant as a result of resignation or death, the President of the European Parliament shall immediately inform the competent authorities of the Member State concerned thereof.

Article 14

Should it appear necessary to adopt measures to implement this Act, the Council, acting unanimously on a proposal from the European Parliament after consulting the Commission, shall adopt such measures after endeavouring to reach agreement with the European Parliament in a conciliation committee consisting of the Council and representatives of the European Parliament.

Article 15

This Act is drawn up in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all the texts being equally authentic.

Annexes I and II shall form an integral part of this Act.

Article 16

The provisions of this Act shall enter into force on the first day of the month following that during which the last of the notifications referred to in the Decision is received.

Udfærdiget i Bruxelles, den tyvende september nitten hundrede og seksoghalvfjerds.

Geschehen zu Brüssel am zwanzigsten September neunzehnhundertsechundsiebzig.

Done at Brussels on the twentieth day of September in the year one thousand nine hundred and seventy-six.

Fait à Bruxelles, le vingt septembre mil neuf cent soixante-seize.

Arna dhéanamh sa Bhruiséil, an fichiú lá de mhí Mhéan Fómhair, míle naoi gcéad seachtó a sé.

Fatto a Bruxelles, addì venti settembre millenovecentosettantasei.

Gedaan te Brussel, de twintigste september negentienhonderd zesenzeventig.